LIBRARY
SUPREME COURT, U. S.

No. 45

Office-Supreme Court, U.S.
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA,

Petitioner,

v.

RICHARD G. AUGENBLICK,

Respondent.

On Writ of Certiorari to the
United States Court of Claims

BRIEF FOR THE RESPONDENT, RICHARD G. AUGENBLICK

JOSEPH H. SHARLITT
STEVEN R. RIVKIN

Counsel for the Respondent
Richard G. Augenblick

Of Counsel:

Fisher, Sharlitt & Gelband
1522 "K" Street, N. W.
Washington, D. C. 20005

August 26, 1968

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
INTRODUCTION	3
COUNTERSTATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	19
ARGUMENT	23
I. The Court of Claims properly found repeated errors under the Jencks Act in Commander Augenblick's Military Trial and properly held that, *under the Circumstances*, these Violations "Cumulated to the Denial of a Minimally fair Trial", in Violation of Due Process	23
A. With Respect to the Burden of Demonstrating Bad Faith, the Refusal of the Trial Court to Examine Agent Mendelson, the Denial of *In Camera* Inspection of Agent Mendelson's Notes, and the Failure to Preserve the Notes for Appellate Review, Commander Augenblick's Trial Violated the Jencks Act.	23
1. The Court of Claims properly found that the Military Proceedings had applied an erroneous rule of law in placing the burden of demonstrating bad faith destruction of Jencks Statements on the Defendant.	24

Page

2. The Court properly found that it was Error for the Law Officer to deny the Defense's request to call Agent Mendelson to explain the disappearance of the Hodges tape. 27

3. The Court of Claims properly found that it was error for the Trial Court to deny an *in camera* examination of Mendelson's notes of the Hodges Interrogation. 35

4. Further Jencks error was necessarily committed when the Interview Notes were not incorporated within the Trial record for examination by the Appellate Courts. 37

B. Under the Circumstances of the Augenblick Trial, These Jencks Act Errors Constituted A Denial of Due Process. . . . 38

1. The Circumstances of the Court-Martial squarely raised the possibility that the Testimony of the Witness Hodges may have been bartered for favorable treatment, but the Jencks Act violations frustrated the use by the defense of that possibility to impeach Hodges' Testimony 38

2. Under these Circumstances, suppression of Jencks Act discovery prevented Commander Augenblick from asserting a vital defense at his court martial, and his right to Due Process of law was thereby violated. 46

3. The Government attempts to minimize the significance of the prejudicial errors in Augenblick, in total disregard of both the obvious importance of Hodges' testimony and the determinations of this Court. 50

Page

II. Article 76 of the Uniform Code Cannot Bar Collateral Review in the Court of Claims and, upon Certiorari, in this Court. 54

A. Neither the Language of Article of War 50 and Article 76 of the Uniform Code, Nor their Legislative Histories Support the Government's Assertion that Congress intended to Bar Court of Claims Jurisdiction. 55

B. If There Be Doubt That Article 76 of the Uniform Code Perpetuates Court of Claims Review of Constitutional Questions Arising in Military Proceedings, Such Doubt Should be Resolved in Favor of Continuing the Traditional Jurisdiction of that Civil Court, since a Contrary Holding Would Render Article 76 Unconstitutional 67

III. The Court of Claims Decision in Augenblick Lies Well Within The Scope of Collateral Review of Military Convictions Appropriate For that Court. 76

A. In Ascertaining Constitutional Error in *Augenblick*, the Court of Claims was Wholly Within its Powers and Duties as a Civilian Constitutional Court. 76

1. The Court of Claims heard and decided the *Augenblick* case in strict conformity with its statutory and constitutional powers. . . . 76

2. In hearing and determining Commander Augenblick's claim, the Court of Claims undertook collateral review of a claim of constitutional error going to the "jurisdiction" of the military

Page

proceedings, as that expanded concept is now understood in the Federal Judicial system. 78

3. In exercising its jurisdiction to review for Constitutional error, the Court of Claims conducted precisely the inquiry sanctioned by this Court in *Burns v. Wilson*, 346 U. S. 137 (1953). 81

4. The decision of the Court of Claims in *Augenblick* is by no means a novel excursion in the jurisprudence of that Court; nor is its decision in invalidating a court-martial sentence likely to prove an unhealthy burden on the military. 86

CONCLUSION 89

STATUTORY APPENDIX 90

CITATIONS

Cases:

Alcorta v. Texas,
355 U. S. 28 (1957) 47, 77

Anthony v. Hunter,
71 F. Supp. 823 (D.C. Kan., 1947) 79

Ashe v. McNamara,
355 F.2d 277 (C.A. 1, 1965) 70, 88

Barbee v. Warden of Md. Penitentiary,
331 F.2d 842 (C.A. 4, 1964) 43

Bary v. United States,
292 F.2d 53 (C.A. 10, 1961) 36

Page

Begalke v. United States,
148 Ct. Cl. 397, 286 F.2d 606 (1960),
cert. denied, 364 U. S. 865 (1960) 86, 87

Bell v. Hood,
327 U. S. 678 (1946) 76

Bergman v. United States,
253 F.2d 933 (C.A. 6, 1958) 52

Blake v. United States,
14 Ct. Cl. 462 (1878), 103 U. S.
(13 Otto) 227 (1880) 54

Brady v. Maryland,
373 U. S. 83 (1963) 47, 49

Brewster v. Gage,
280 U. S. 327 (1930) 62

Burns v. Wilson,
346 U. S. 137 (1953) 4-6, 22, 55, 62, 69, 73, 78, 81, 82, 84-86

Campbell v. United States,
365 U. S. 85 (1961) 36, 53

Campbell v. United States,
373 U. S. 487 (1963) 36, 52, 53

Cary v. Curtis,
44 U. S. (3 How.) 236 (1845) 67, 70

Chapman v. California,
386 U. S. 18 (1967) 51

Clancy v. United States,
365 U. S. 312 (1966) 53

Crowell v. Benson,
285 U. S. 22 (1932) 72, 75

Eastport Steamship Corp. v. United States,
178 Ct. Cl. 599, 372 F.2d 1002 (1967) 77

Edward's Lessee v. Darby,
25 U. S. (12 Wheat.) 206 (1827) 62

Estep v. United States,
327 U. S. 114 (1946) 71, 75

Page

Fahy v. Connecticut,
375 U. S. 85 (1963) 47

Falbo v. United States,
320 U. S. 549 (1944) 71

Fletcher v. United States,
26 Ct. Cl. 541 (1891), *rev'd.* 148 U. S. 84 (1893) 54

Gallagher v. Quinn,
363 F.2d 301 (C.A.D.C., 1966), *cert. denied*,
385 U. S. 881 (1966) 70, 88

Giles v. Maryland,
386 U. S. 66 (1966) 47, 48

Glidden Co. v. Zdanok,
370 U. S. 530 (1962) 55, 73, 88

Goldstein v. Johnson,
184 F.2d 342 (C.A.D.C.,
1950), *cert. denied*, 340
U. S. 879 (1950) 80

Gordon v. United States,
344 U. S. 414 (1953) 53

Graham v. United States,
136 Ct. Cl. 324 (1956),
cert. denied, 353 U. S.
917 (1957) 86

Griffiths v. United States,
145 Ct. Cl. 669, 172 F. Supp.
691 (1959), *cert. denied*, 361
U. S. 865 (1959) 86

Gusik v. Schilder,
340 U. S. 128 (1950) 62, 64, 69, 72

Harmon v. Brucker,
355 U. S. 579 (1958) 72, 88

Ex Parte Hawk,
321 U. S. 114 (1944) 65

Page

Hicks v. Hiatt,
64 F. Supp. 238 (D.C. Pa., 1946) 79

Hiatt v. Brown,
339 U. S. 103 (1950) 80

Hilliard v. United States,
317 F.2d 150 (C.A.D.C., 1963) 36

Hooper v. United States,
164 Ct. Cl. 151, 326 F.2d 982 (1964), *cert. denied*,
377 U. S. 977 (1964) 55, 87

Humphrey v. Smith,
336 U. S. 695 (1949) 58, 80, 81

Jencks v. United States,
353 U. S. 657 (1957) 49, 52

Johnson v. Zerbst,
304 U. S. 458 (1938) 22, 78-80, 84

Keyes v. United States,
15 Ct. Cl. 532 (1879), *aff'd* 109 U. S. 336 (1883) . . . 54

Killian v. United States,
368 U. S. 231 (1961) 25, 36

Krivoski v. United States,
136 Ct. Cl. 451, 145 F. Supp. 239 (1956),
cert. denied, 352 U. S. 954 (1956) 86

Lehman v. United States,
252 F.2d 951 (C.A. 6, 1959) 52

Lockerty v. Phillips,
319 U. S. 182 (1943) 71

Ex Parte McCardle,
74 U. S. (7 Wall.) 506 (1868) 71

Monongahela Bridge Co. v. United States,
216 U. S. 177 (1910) 70

Mooney v. Holohan,
294 U. S. 103 (1935) 47, 65

Moore v. Dempsey,
261 U. S. 86 (1923) 78, 79

Page

Mullan v. United States,
23 Ct. Cl. 34 (1888), *aff'd*, 140 U. S. 240 (1891) 54

Napue v. Illinois,
360 U. S. 264 (1959) 47, 77

Narum v. United States,
151 Ct. Cl. 312, 287 F.2d 897 (1960), *cert. denied*,
368 U. S. 848 (1961) 87

Ng Fung Ho v. White,
259 U. S. 276 (1922) 75

Norwegian Nitrogen Products Co. v. United States,
288 U. S. 294 (1933) 62

Odgen v. United States,
303 F.2d 724 (C.A. 9, 1962) 26, 31

Osborn v. Bank of United States,
22 U. S. (9 Wheat.) 738 (1824) 76

Palermo v. United States,
360 U. S. 343 (1959) 36, 46

Phillips v. Commissioner,
283 U. S. 589 (1931) 71

Pyle v. Kansas,
317 U. S. 213 (1942) 47

Rosenberg v. United States,
360 U. S. 367 (1959) 52, 53

Runkle v. United States,
19 Ct. Cl. 396 (1884), *rev'd.*, 122 U. S. 543 (1887) . . . 54

St. Joseph Stock Yards Co. v. United States,
298 U. S. 38 (1936) 74

Saunders v. United States,
316 F.2d 346 (C.A.D.C., 1963) 30

Shapiro v. United States,
107 Ct. Cl. 650, 69 F. Supp. 205 (1947) . . 55, 70, 79, 86

Shaw v. United States,
174 Ct. Cl. 899, 357 F.2d 949 (1966) 70, 86, 88

Page

Sima v. United States,
119 Ct. Cl. 405, 96 F. Supp. 932 (1951) 55

Smith v. Hiatt,
170 F.2d 61 (C.A. 3, 1948) 79

Stark v. Wickard,
321 U. S. 288 (1944) 75

United States v. Anderson,
269 U. S. 422 (1926) 62

United States v. Borden Co.,
308 U. S. 188 (1939) 62

United States v. Brown,
41 Ct. Cl. 275 (1906), *aff'd*, 206 U. S. 240 (1907) . . 54, 77

United States v. Crosby,
294 F.2d 928 (C.A. 2, 1961), *cert. denied, sub nom Mittelman v. United States*, 368 U. S. 984 (1962) . . . 26

United States v. Hilbrich,
232 F. Supp. 111 (N.D. Ill., 1964), *aff'd*, 341 F.2d 555 (C.A. 7, 1965), *cert. denied*, 381 U. S. 941 (1965) 26

United States v. Keig,
320 F.2d 634 (C.A. 7, 1963) 36

United States v. Page,
25 Ct. Cl. 254 (1890), *rev'd*, 137 U. S. 673 (1891) . . 54

United States v. Perkins,
116 U. S. 483 (1886) 76

United States v. Prinz,
264 F.2d 850 (C.A. 3, 1959) 52

United States v. Reynolds,
345 U. S. 1 (1953) 49

United States v. Tempia,
16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) 70, 87

United States v. Thomas,
282 F.2d 191 (C.A. 2, 1960) 26, 36

	Page
United States v. Tomaiolo, 317 F.2d 324 (C.A. 2, 1963), *cert. denied*, 375 U. S. 856 (1963)	26
United States Ex Rel Innes v. Hiatt, 141 F.2d 664 (C.A. 3, 1944)	79
United States Ex Rel Touhy v. Ragen, 340 U. S. 462 (1951)	49
Vitarelli v. Seaton, 359 U. S. 535 (1959)	77
Wade v. Hunter, 336 U. S. 684 (1949)	73, 81
Whelchel v. McDonald, 340 U. S. 122 (1950)	66, 81
Williams v. United States, 328 F.2d 178 (C.A.D.C., 1963)	31
Yakus v. United States, 321 U. S. 414 (1944)	71
Ex Parte Yerger, 75 U. S. (8 Wall.) 85 (1868)	71
Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579 (1952)	74
Statutes:	
Act of Feb. 24, 1855, c. 122, 10 Stat. 612	54
Act of June 4, 1920, c. 227, Sec. 1, *et seq.*, 41 Stat. 787, *et seq.*	60
Act of Oct. 12, 1949, 63 Stat. 809, 37 U.S.C. §204	6
Act of July 28, 1953, c. 253, P. L. 158	72

	Page
Articles of War	
Article 50h, as added by the "Elston Act", Act of June 24, 1948, c. 625, 62 Stat. 635	55, 56, 58, 60-64
Article 50½	61
Article 53	3, 65, 66
Article 70	81
Jencks Act, 18 U.S.C. §3500 (1957)	3, 13, 16-21, 23-25, 27, 31, 34-46, 48-50, 52-53, 85
Legislative Reorganization Act of 1946, 10 U.S.C. §1552	62
Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, *et seq*	72
Selective Service Act of 1948, §226, c. 625, 62 Stat. 604	62
Tucker Act, Act of March 3, 1887, c. 359, 24 Stat. 505, 28 U.S.C. §1491, 2501	3, 63, 64, 76
Uniform Code of Military Justice, c. 169 §1, 64 Stat. 108-145, 10 U.S.C. §§801-940 (1950)	
Article 32, 10 U.S.C. §832	13, 33
Article 71, 10 U.S.C. §871	6
Article 73, 10 U.S.C. §873	65
Article 76, 10 U.S.C. §876	2, 3, 21, 54-57, 60, 63-65, 67-69, 72, 75
Article 125, 10 U.S.C. §925	5, 16, 33, 40
Article 133, 10 U.S.C. §934	33
Article 134, 10 U.S.C. §934	5, 17, 33
Article 135, 10 U.S.C. §935	13, 32
Miscellaneous:	
96 Cong. Rec., 1414 (1950)	59
96 Cong. Rec., 1434-1441 (1950)	56, 57

	Page
96 Cong. Rec., 7927, 8540 (1950)	63
103 Cong. Rec., 15933-4215, 928, 16487-9, 16738 (1957)	46
Davis, *Administrative Law Treatise* (1958)	69
Gusik v. Schilder, Brief of Respondent, October Term, 1950, No. 110	65
Hart & Wechsler, *Federal Courts and the Federal System* (1953)	72
Hearings on H.R. 2498 before Sub-Committee No. 1 of the House Armed Services Committee, 81st Cong., 1st Sess. (1949)	59, 60
Hearings on H.R. 2575 before Sub-Committee No. 11 (Legal) of the House Armed Services Committee, 80th Cong., 1st Sess. (1947)	61
Hearings on H.R. 7741 and H.R. 2575 before the House Armed Services Committee, 80th Cong., 1st Sess. (1947)	63
Hearings on S. 857 and H.R. 4080 before a Subcommittee of the Senate Armed Services Committee, 81st Cong., 1st Sess. (1949)	60
H.R. 2575, 80th Cong., 2d Sess. (1947)	60
H.R. 4080, 80th Cong., 2d Sess. (1948)	56
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947)	63
H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949)	56
H.R. Rep. No. 695, 83rd Cong., 1st Sess. (1953)	64
H.R. Rep. No. 1034, 80th Cong., 1st Sess. (1947)	61
H.R. Rep. No. 2646, 79th Cong., 2d Sess. (1946)	63
Jaffe, *Judicial Control of Administrative Action* (1965)	69
Keefe and Moskin, *Codified Military Injustice – An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 Cornell, L. Q. 151 (Fall 1949)	56
Keefe and Pasley, "Review by Civil Courts" (the "Keefe Report"), Report of the General Court-Martial Sentence Review Board of the Navy on *Court-Martial Procedures and Policies* (1947)	57, 58

Page

Legislative History: Amendments to the Articles of War. 80th Cong. (1948) (Supreme Court Library) 56, 60

Legislative History, Uniform Code of Military Justice, 81st Cong. (1949) (Supreme Court Library) 56

Meador, *Judicial Determinations of Military Status,* 72 Yale L. J. 1293 (1963) 77, 87

41 Ops. Att'y Gen. 49 (1949) 62

S. Rep. No. 486, 81st Cong., 1st Sess. (1949) 56

Warren, C. J., *The Bill of Rights and the Military* (The James Madison Lecture before the N.Y.U. Law Center, Feb. 1, 1962), 37 N.Y.U.L. Rev. 181 (1962) 5

Whelchel v. McDonald, Brief for Respondent, October Term, 1950, No. 109 66

IN THE

Supreme Court of the United States

October Term, 1968

No. 45

UNITED STATES OF AMERICA,

Petitioner,

v.

RICHARD G. AUGENBLICK,

Respondent.

On Writ of Certiorari to the
United States Court of Claims

BRIEF FOR THE RESPONDENT, RICHARD G. AUGENBLICK

OPINION BELOW

The opinion of the Court of Claims is reported at 377 F.2d 586 and reproduced starting on page 313 of the Appendix. The opinions of the Department of the Navy Board of Review are unreported, but are reproduced in the Appendix, pp. 17-58.

JURISDICTION

The judgment of the Court of Claims was entered on May 12, 1967. A timely motion for reconsideration was denied on November 9, 1967. By order of February 1, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 7, 1968.

The petition for writ of certiorari to review the judgment was filed on March 7, 1968 and was granted on April 29, 1968, 390 U. S. 1038. The jurisdiction of this Court is conferred by 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1). Whether suppression during a court-martial of a military defendant's guaranteed rights to discover materials which, under the facts of the case, are of prime importance to his assertion of a key defense, constitutes a violation of due process.

2). Whether Congress, in enacting Article 76 of the Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 132, 10 U.S.C. §876), intended to deprive military defendants convicted by courts-martial in violation of due process, of all remedies before civil courts, including the Court of Claims and the United States Supreme Court, solely because they were cashiered rather than imprisoned.

3). Whether, if Congress did so intend, Article 76 is unconstitutional in that it deprives a military defendant whose constitutional rights have been violated of all remedies before civil courts.

4). Whether, if Congress did not so intend, the Court of Claims, and the Supreme Court in review of the Court of Claims, may inquire into and remedy violations of due process before courts-martial.

STATUTES INVOLVED

The Brief for the United States adequately sets forth (Gov. Br. 2-3) in pertinent part the provisions of Article 76 of the Uniform Code of Military Justice (hereafter sometimes referred to as the "Uniform Code" or the "U.C.M.J."), 10 U.S.C. §876 (1950). In addition to the portions of the Jencks Act, 18 U.S.C. §3500, set forth in the Government's brief, sub-section (c) of said section is also pertinent, and is set forth in the verbatim text of said act in the Statutory Appendix hereto.

The Statutory Appendix also includes pertinent portions of the statutory basis for jurisdiction of the Court of Claims, 28 U.S.C.§1491 (1954), Article of War 50h (the predecessor of Article 76 of the U.C.M.J.) and Article of War 53 (relating to the finality of all action taken under said Article with respect to new trials).

INTRODUCTION

A reading of the Government's Brief does not reveal the sweeping curtailment of the rights of servicemen implicit, but not openly stated in its position. In reality, the Government proposes nothing less than the elimination of all recourse to civilian courts for all military defendants whose constitutional rights were violated during their courts-martial, and whose punishment happened to be dismissal and disgrace rather than imprisonment.

If the nuances of the Government's notion of constitutional review by this Court are drawn to their logical conclusion, putting aside the Government's alternate predilection for retrying the guilt or innocence of Commander Augenblick, the Government would stop this Court's review at the threshold of its examination of constitutional error. It would do so because it contends that *no civilian court* has jurisdiction to entertain any claim of

constitutionality, be it of the grossest sort, on behalf of any military defendant unless that defendant is in prison. Commander Augenblick, cashiered and disgraced without due process (as found by a unanimous court below) has no remedy. The great protection of constitutional review by a civilian court, and especially by *this* Court, is denied him, his rights are forfeit – he is not in jail.

But this Court has always recognized that *all* servicemen are entitled to the protection of basic guarantees of due process in criminal prosecutions. So held this Court unequivocally in *Burns v. Wilson*, 346 U. S. 137 (1953):

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." 346 U. S. at 142-3.

The *Augenblick* case represents a test of whether those constitutional guarantees[1] have lost their meaning to an entire class of servicemen. For if the experience of this

---

[1] This case was joined with another in the Petition for the sole reason that both arose from military prosecutions followed by proceedings in the Court of Claims. Since the Court of Claims limited its holding to the facts in *Augenblick*, and since the limited jurisdiction of that court turns on the existence *vel non* of constitutional injury in the particular case before it, all representations in this Brief deal exclusively with the *Augenblick* decision. Whatever questions might arise in other cases, the jurisdiction of both the Court of Claims and this Court with regard to *Augenblick* is clear from the long history of judicial action, unimpaired by any legislative enactment, as is shown, *infra*.

case means anything, it means that military justice can still be the rough-hewn affair it was during the two World Wars. And if this is so, elimination of all review in the civilian courts[2] for convicted and dismissed servicemen with substantial constitutional grievances is, indeed, a frightening spectre.

COUNTERSTATEMENT OF THE CASE

On September 13, 1961, the Respondent Commander Richard G. Augenblick was convicted by a Navy general court-martial of the offense of committing an indecent, lewd and lascivious act, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C.§934, a lesser included offense to the charge of sodomy, under Article 125 of the Uniform Code, 10 U.S.C. §925, on which he was brought to trial, and acquitted. The sentence was dismissal from the Naval Service. In the court-martial trial, significant violations of the defendant's constitutional rights took place, which were not subsequently remedied by a Navy Board of Review, which affirmed Commander Augenblick's conviction. The Court of

---

[2] Contrast this suggestion with Justice Warren's summary of the legal status of this Nation's citizen-soldiers reflected by the *Burns v. Wilson* opinions: " . . . I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, C. J., *The Bill of Rights and the Military* (the James Madison Lecture before the New York University Law Center, February 1, 1962), 37 N.Y.U.L. Rev. 181 (1962).

Military Appeals denied review,[3] and the Commander was dismissed from the Navy.[4]

His military remedies exhausted, Commander Augenblick brought this suit in the Court of Claims to recover back pay (due him pursuant to the Act of October 12, 1949, 63 Stat. 809, 37 U.S.C. §204), on grounds that his conviction and dismissal were invalid because the military proceedings had violated his constitutional right to a fair trial. On May 12, 1967, a unanimous Court of Claims (per Judge Oscar Davis), upon review of the record in the military proceeding, found errors

> "which mount to a constitutional defect which grows directly from, and is entwined with, erroneous legal rulings by the law officer and the Board of Review." 377 F.2d 586 at 593 (A-319).

So finding, the Court of Claims held that the requirements of this Court's rule in *Burns v. Wilson*, 346 U. S. 137 (1953),

---

[3] A Petition for Grant of Review by the Court of Military Appeals was denied on January 11, 1963, without opinion. Reconsideration was denied by that court on January 29, 1963, also without opinion. The Secretary of the Navy declined review under Article 71 of the U.C.M.J., 10 U.S.C. §871 (1950), on January 11, 1963. Petitioner was dismissed with total forfeitures as of February 5, 1963, and has not been reinstated since. On November 14, 1964, the Board for Correction of Records denied Petitioner's application for correction of his records.

[4] Commander Augenblick had served the Navy with distinction for 18 years prior to the night of January 11-12, 1961, the date of the alleged offense. His duty had included combat and command experience, schooling at the Naval War College, service in the Office of the Secretary of Defense and the Strategic Plans Division of the Office of Naval Operations. His record was without blemish, and he had been selected for promotion to a captaincy.

> "for full and fair consideration of the case by the military has not been fulfilled for this plaintiff . . ." 377 F.2d at 593 (A-319),

and invalidated Commander Augenblick's conviction and sentence.

The issue before the Court of Claims was *not* the guilt or innocence of Commander Augenblick, either of the offense of which he was charged or the offense of which he was found guilty.[5] The issue[6] upon which the court rested its determination of serious constitutional error was solely the question whether materials of key importance to Commander Augenblick's defense had been denied him. It found –

> "In the absence of satisfactory alternative means of discovery, the legal errors committed by the law officer and the Board of Review deprived the accused of rights which were extremely valuable to him – of cardinal moment in this case. He was denied a necessary step toward obtaining, or discovering the status of, materials of first-rank for his defense. In our view, this denial, in the circumstances, seriously impeded his right to a fair trial in violation of the Due Process Clause of the Constitution." 377 F.2d at 606 (A-342).

---

[5] Thus, the Government's speculations in its petition (Pet. 6) and its brief on the merits (Gov. Br. 73-74) that Commander Augenblick's conviction on a lesser charge are fully supported by evidence unaffected by constitutional taint are misleading and beside the point. The Court of Claims concerned itself solely with the constitutional question of whether Commander Augenblick had received a fair trial.

[6] Commander Augenblick's further contention that his two trials had exposed him to double jeopardy was rejected by the Court of Claims. 377 F.2d at 593-6 (A-319-23).

The Court of Claims reached this finding and conclusion upon an examination of the record of the military proceedings which, in its view, substantiated Commander Augenblick's contention that his conviction and sentence were constitutionally invalid.

Commander Augenblick was apprehended on the night of January 11-12, 1961 by two police officers, Round and Pickeral, while in a parked car in West Potomac Basin Park in the company of a twenty-year old Airman, Hodges, whose testimony was to have pivotal importance in Commander Augenblick's subsequent trial. Immediately upon apprehension, and thereafter throughout this proceeding, Commander Augenblick denied that he had been guilty of any unlawful activity[7] (A-86; 292-4).[8]

Both Commander Augenblick and Airman Hodges were taken into police custody and turned over to civilian Naval Intelligence investigators within two hours of the arrest (A-309-19; 192), for questioning at the Armed Forces Police Headquarters at the Naval Weapons Plant, where they were separately interrogated in turn (A-128-30). The crucial issues in this case pertain to court-martial rulings with respect to evidence concerning the interrogation of Airman Hodges, as set forth in the following excerpt from the opinion of the Court of Claims:

---

[7] Commander Augenblick testified on his own behalf that prior to the time of his arrest he had become very sleepy after having had some scotch and several beers and had pulled into the Park for a short nap, from which he was awakened by the police officers (A-285-8; 290-2).

[8] Citations in this brief to the Appendix are made by "A" followed by the page number; citations to the Petition are "Pet." followed by the page number; citations to the Government's Brief on the Merits are "Gov. Br." followed by the page number.

"The challenged rulings involve the early-morning interrogation of Airman Hodges immediately after the arrest. At the civilian police station, both the Commander and the Airman denied that 'anything' had happened. After being turned over to the Armed Services Police, they were brought to the headquarters of the Potomac River Naval Command at the Naval Weapons Plant in Washington for interrogation. It was then about three o'clock in the morning of January 12, 1961. The Airman and the accused were questioned separately in a room designed for the monitoring and recording of conversation. Agent Connor of the Office of Special Investigation of the Air Force (OSI) interrogated Hodges, while Agent Mendelson, the civilian employee of the Office of Naval Intelligence (ONI), observed, asked some questions, and took notes;[9] after twenty to twenty-five

---

[9] What little testimony there is from Agent Mendelson at pre-trial proceedings clearly shows he had taken notes during the questioning of Hodges. Mendelson said —

> "I do recall that the information that was given at this interview was later more or less typed up in — you might say a memo report for my own information just setting down such things as what time I was called, what time I arrived there, and what Hodges said." (A-132). In later description of these notes, the Government prosecuting counsel was more precise " . . . And mostly he [Mendelson] tells me it has to do with what he did that day — that is to say . . . I went to the Gun Factory and so on, but it does, he tells me, summarize, or at least refer to the language that Hodges used or some that he said. I'll get on the witness stand and testify to that if you desire, but I — that is what I'm told the situation is." (A-210).

minutes[10] Connor accompanied the twenty-year old Hodges to the separate Air Force OSI Headquarters in Maryland where Hodges swore to a five-page written statement describing the evening's events. After the Hodges session at the naval station, Mendelson interrogated the accused for about two hours. During both interviews at the naval station, Agent James, the duty officer at that post, was in the adjacent room.[11] He testified unequivocally that he had made tape recordings of both sessions – one reel of the Hodges[12] and two reels of the Augenblick interrogation." 377 F.2d at 596 (A-324).

During Hodges' interrogation, the young Airman apparently changed his previous story and thereafter maintained in pre-trial proceedings and at trial that the offense of sodomy had taken place (A-88-92; 72; 190-2). This testimony was crucial to the Navy's decision to try Commander Augenblick on a charge of having violated Article 125[13] and, as the Court of Claims found, "without his testimony it seems unlikely that the court-martial would have convicted, even of the lesser offense." 377 F.2d at 605 (A-339).

---

[10] A-217.

[11] A-146-7; 217.

[12] A-146-8; 217.

[13] It is very clear from the testimony of Commander Raymond Glasgow who conducted the initial pre-trial investigation of the offense alleged that the testimony of Airman Hodges was *the* key factor in the Navy's determination to try Commander Augenblick. At Commander Augenblick's first trial on May 2, 1961, the trial

(Con't.)

The circumstances by which Hodges changed his story from denying that "anything happened" to testifying that sodomy had occurred would hence have been of vital importance to the defense in impeaching Airman Hodges' crucial testimony. As the Court of Claims reasoned –

> "What he said thereafter at his first interrogation in the early morning at the Naval Weapons Plant, what questions he answered, how he was interrogated, would clearly have a significant bearing on the reliability of the statement thereafter written up at Air Force headquarters and on the credibility of his testimony at the trial . . . Since Hodges during the trial apparently expected to receive an honorable discharge,[14] and subsequent to

---

[13] (Con't.)

counsel placed Commander Glasgow on the stand and inquired whether the statement of one of the arresting officers, Round, had been utilized in "formulating your recommendation as to what disposition should be made of the charges . . ." Commander Glasgow answered, as follows:

> "Well, not necessarily. There was an original witness by the name of Hodges, and this [Round's written statement] was only corroboration to go along with the Airman's testimony. So this was just actually added to it. There was a witness who appeared in person and was subject to cross-examination before the pretrial. So this is only corroboration . . . As I say, this was just cumulative. Actually one witness, Hodges, was sufficient evidence to make the recommendation. This was cumulative. This was just corroboration . . ." (A-64).

[14] The morning after the alleged offense, Airman Hodges was confronted by his Commanding Officer (A 260-1). Three weeks later Hodges was notified by the same officer that he was being (Con't.)

> the plaintiff's conviction was in fact honorably discharged from the Service, it was also very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session." 377 F.2d at 605 (A-339).

The defense efforts to ascertain what transpired in Hodges' initial interview, specifically, whether any arrangement for the testimony of the principal prosecution witness had been made which could vitiate the force of Hodges' accusation, met with total and disastrous failure. Upon the testimony of Hodges in the second trial[15] the

---

[14] (Con't.)

recommended for an honorable discharge (A-261-2), after only 12½ months of a four-year enlistment (A-75). But the Air Force would not actually give this discharge until the Augenblick trial, and on September 8, 1961, seven months later, Airman Hodges testified as the principal prosecution witness (A-261). It was not until after the trial (which ended on September 13) that Hodges was honorably discharged. The parties stipulated in the Court of Claims that Airman Hodges was honorably discharged between September 13 and 18, 1961.

[15] Commander Augenblick's first trial was terminated as defectively originated, when it became apparent that the allegedly sworn written statement of a civilian police officer, had not in fact been sworn (A-66-7). Agent Mendelson had testified at an initial pretrial investigation that he had taken a sworn statement of Officer Round, as he had indicated on the jurat affixed thereto (A-68-9). Subsequently, at the first trial (on May 2, 1961), the officer testified that he had not in fact been sworn. The Law Officer then terminated the trial as defectively originated, returned the case to the convening authority, who, in turn, convened a Court of Inquiry, which ordered a second court-martial. This conduct of Agent Mendelson, whose role in marshalling evidence against Commander Augenblick was obviously pivotal, led the Court of Claims

(Con't.)

defense moved for the production of the notes which Agent Mendelson had taken and the tape which Agent James had made, pursuant to the specific mandate of the Jencks Act, 18 U.S.C. §§3500(a) and (e) (A-193). With respect to the notes, which Mendelson had indicated contained "what Hodges said" and Government counsel had admitted contained "language that Hodges used" (see footnote 9, p. 9, *supra*), the Law Officer, without conducting any examination of the notes (*in camera* or otherwise), flatly denied the request (A-212).[16]

The trail of the tape was more tortuous, and again the Court of Claims aptly summarized the proceedings –

> "The law officer ordered either that the tape-recording be produced or that the Government produce witnesses at an out-of-court

---

[15] (Con't.)

to observe that "It was evident, we stress, from his earlier testimony that Mendelson was not a witness whose prior statements could be accepted at face value." 377 F.2d at 602 (A-334).

[16] The Government's contention in its Brief (Gov. Br. 19, fn. 11) that the defense failed to seek access to these notes at pre-trial or court of inquiry proceedings points down a misleading and essentially false trial. What occurred in pre-trial (probable cause) proceedings essentially comparable to civilian grand jury proceedings (see Articles 32 and 135 of the U.C.M.J., 10 U.S.C. §§832 and 935), has no bearing whatsoever on the strictures upon the trial court under the Jencks Act. Production must take place at trial, after the prosecution introduces its witness, else the statutory stricture in the alternative, of production or striking the witness' testimony would be meaningless. Thus, what did or did not take place at pre-trial does not absolve the prosecution or the Law Officer of their obligations under Jencks. Moreover, the Government again suggests that the defense made no effort to inspect the notes, in total contrast to the unchallenged affidavit of Commander Werner Windus (see App. A, Respondent's Brief in Opposition to Certiorari).

> hearing who 'can explain' its non-existence if the tape were not available [(A-208)] . . . The Government did not produce the Hodges tape-recording, but called as witnesses each of the intelligence officers who had contact with the recording, except Agent Mendelson who was in Norfolk at the time of the second trial in Washington.' The upshot of the testimony was that, though James testified that he had made the tape, no one then had it or had heard it or knew what had happened to it. The defense urged the calling of Mendelson [(A-255)], but the law officer, after reading the record of Mendelson's testimony on the tape-recording at a pre-trial investigation, refused to have him called as a witness [(A-255)] and concluded that no sanction should be imposed on the prosecution for failing to produce the recording [(A-256-7)]. The Board of Review (with a dissent on this point) affirmed, holding, among other things, that 'It was the responsibility of counsel for defendants, [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording that was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government, [A-38]' " 377 F.2d at 586-7 (A-324).

The details of the court-martial treatment of the tape (summarized above by the Court of Claims) are even more startling. Mendelson had in pre-trial proceedings totally disclaimed any recollection of a tape of the Hodges interview. His colleague on the night of the arrest, Agent James, however, testified that after consultation with Mendelson, he, Agent James, went to the "Sound Room"

and taped the Hodges interview (A 217). It lasted 25 minutes (A-217). James also taped an interrogation of Commander Augenblick that followed immediately after the Hodges questioning. James then went to Mendelson's office at the Navy Center in Arlington to turn the tapes over to Mendelson, but Mendelson was not there. James, thereafter, turned the tapes over to Agent Fason, Mendelson's superior, for retransmittal to Mendelson (A-220). Agent Fason brought the matter full circle by testifying specifically that he had turned the tape over to Mendelson (A-238), notwithstanding Mendelson's persistent unwillingness at pre-trial to admit that he ever possessed the tape (A-139-41). James testified he had searched all of the areas at the Naval Weapons Plant where the tape might be, but had been unable to find it (A-221-2), although the tape of Commander Augenblick's questioning, however, was curiously available (A-226). Another witness testified that the headquarters of the ONI at the Navy Center at Arlington had also been searched and the Hodges tape had not been found (A-233-4). After additional out-of-court testimony, all that could be gleaned was that Mendelson once had the Hodges tape, but that everyone concerned with the search – that is every intelligence agent *other than* Mendelson – could not now find it.

The defense then asked that Mendelson be called from Norfolk where he was then located, to testify against the foregoing background as to the whereabouts of the Hodges tape. Mendelson had testified at pre-trial, it will be noted, that in all likelihood a tape of the Hodges questioning had *not* been made (A-133), that he had no recollection of a Hodges tape (although James who took the tape testified that he had consulted with Mendelson prior to taking it) and that he "did not recall" ever having received a tape of Hodges' questioning (A-139), although his own superior –

Fason – testified at the trial that he had turned it over to Mendelson (A-237).[17]

Against a showing that the trail of the tape had ended inexplicably with Mendelson, the Law Officer then made what can only be termed an incredible error of law in the ruling as follows:

> "But in view of everything that I have heard, at this time I will not grant the Government [sic] to produce Mr. Mendelson from Norfolk." (A-255).

To this ruling, the defense immediately took exception and, under the Jencks Act, 18 U.S.C. §3500(d) (1957), moved to strike the vital Hodges testimony, integral to the Government's case. This motion was also denied (A-256-7).

The court-martial then went forward and found Commander Augenblick not guilty of the charge and specification under Article 125 of the U.C.M.J., 10 U.S.C. §925 (1950), but – with the witness Hodges' testimony still in the record, and unimpeached – guilty of a violation

---

[17] Agent Fason's testimony at the trial that "to the best of my recollection, I passed the tapes to Mr. Mendelson . . ." (A-237) was an especially compelling reason for calling Mendelson to the stand. The additional pre-trial proceedings relied upon by the Law Officer had shed little light on the whereabouts of the tape, but gave little reason to suspect misconduct with respect to it. Although the tape could not be located, Mendelson's testimony in the same proceedings that "I don't recall receiving a tape with Hodges' recording on it" (A-139) was at least plausible. But now, at trial, as the direct result of Agent Fason's fresh testimony, the basis of any reliance upon the record of the additional pre-trial for the conclusion that Mendelson did not have the tape or could not be helpful in locating it or explaining where it was, was clearly, categorically and specifically impeached!

of Article 134 of the U.C.M.J., 10 U.S.C. §934 (1950) – of committing a "lewd and lascivious act."[18]

Subsequently, on September 20, 1962, a Navy Board of Review affirmed Commander Augenblick's conviction and sentence of dismissal, placing the burden of showing bad faith in the Government's failure to produce the tape upon the *defense* (A-38). All other Jencks denials were similarly condoned. A dissent entirely disagreed, and held the proceeding to have been fatally marred by Jencks Act violations.

This is the factual background of the Jencks issues in this case as it came to the Court of Claims, on October 22, 1964. In holding for the claimant, that court stated clearly that it was not concerned with "the weight or substantiality of the evidence", but with "alleged procedural defects said to constitute . . . a denial of due process." 377 F.2d at 590 (A-313). Upon the record before it, it

---

[18] The Government's characterization of the totality of the testimony against Commander Augenblick suggests, erroneously, that this Court should substitute itself now for the original finders of fact, and confirm that "this finding undeniably reflects the fact-finder's acceptance of the testimony of the police officers, rejection of Augenblick's defense that he was asleep, and non-reliance on Hodges' testimony that an act of oral sodomy had been completed." (Gov. Br. 8). This Court obviously cannot properly vote for guilt or innocence on a record amputated of Hodges' testimony. This clairvoyant exercise is repugnant to a reviewing court; it is especially so when the issue is whether a defendant's constitutional rights have been denied. Moreover, the reliance on Hodges' testimony both by the Navy in bringing Commander Augenblick to trial (A-63-4) and of the trial court in convicting him (as found by the Board of Review in the context of mutual corroboration of the police officers' inconsistent testimony (A-46-7), is absolutely clear.

found errors that ranged the full breadth of the Jencks Act. First, the court found that the Board of Review improperly placed the burden on Commander Augenblick of proving the Government's bad faith in non-production of the Hodges tape. 377 F.2d at 598-600 (A-330). Next, the court found that the failure of the Law Officer to call Mendelson for testimony "substantially prejudiced" Commander Augenblick's rights. 377 F.2d at 600-602 (A-331-5). Finally, the court found that the Law Officer erred in refusing to conduct an *in camera* examination of Mendelson's notes before denying discovery of them to the defense. 377 F.2d at 602-604 (A-335-7). The court carefully limited the scope of its ruling by declaring its view that –

> "Every violation of the protections afforded by the Jencks Act does not, in and of itself, amount *ipso facto* to a violation of the Due Process Clause." 377 F.2d at 604 (A 338).

The court then looked to the circumstances of the particular case before it to determine whether these violations rose to the level of constitutional injury. It found that –

> "A combination of factors leads us to conclude that in this case the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial." 377 F.2d at 605 (A-339).

These factors were: that Hodges was an all-important prosecution witness, whose veracity prudently should have been tested by the materials kept from the defense; that he was young and obviously frightened; and that he openly had been offered an honorable discharge whose execution had been delayed until the end of the Augenblick trial. The Court properly felt it

> "very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session." 377 F.2d at 605 (A-340).

Moreover, the court felt that Hodges' testimony was pivotal to *any* conviction whatsoever of Commander Augenblick, even of a lesser included offense than the one with which he was charged, since all the other testimony availabl (including that of the arresting officers) was not necessarily inconsistent with the Commander's defense that he had fallen asleep. *Ibid.* In so ruling the court bore well in mind the nature of the sex offense charged, which, heinous as it is, is "not difficult to utter but arduous to defend." 377 F.2d at 606 (A-340). In a situation where the accused had never before been so accused, where such charges often fall easy prey to unreliable, unbalanced accusers, and where they depend on direct and explicit accusations of the accuser, the court felt that the materials drawn from an interrogation immediately after the alleged occurrence "would have been especially important to the defense in the court-martial." 377 F.2d at 606 (A-340). Lacking any other means of obtaining these materials in this case, the defendant was faced not simply with a procedural lapse on the part of the Government. The very essentials of his defense, the Court of Claims found, had been denied him in violation of his right to due process of law.

SUMMARY OF ARGUMENT

1. In its review of Commander Augenblick's conviction by a military court-martial, the Court of Claims found repeated error in rulings by the trial court and the Navy Board of Review under the Jencks Act, 18 U.S.C §3500. These rulings seriously prejudiced the accused's rights to

raise the defense that the testimony of the principal prosecution witness, also a serviceman, had been bartered for an honorable discharge. The errors of law were several, and comprehensive with respect to the defense sought to be raised by Commander Augenblick. These errors were, as the Court of Claims properly found, as follows:

a) With respect to the burden of demonstrating bad faith in the unavailability of a tape recording of the prosecution witness' initial interrogation, the Navy Board of Review improperly placed the burden on the defense, rather than the prosecution, which alone could explain its unavailability.

b) In the failure to call Agent Mendelson to testify as to the whereabouts of the tape, when he was the last custodian of the tape and had demonstrated a high disregard for proper prosecutorial procedure, the Law Officer failed to comply with his "affirmative duty" to enforce the Jencks Act.

c) In failing to examine Mendelson's notes of the interrogation, the Law Officer erroneously disregarded the Jencks Act's requirements to conduct such investigation of a "statement" asserted to be within the scope of that Act.

Furthermore, the Law Officer, by virtue of failing to order the production of the notes erroneously failed to make these notes available for appellate review, in further violation of the requirements of the Act.

Under the circumstances of the *Augenblick* trial, these errors seriously impeded the right of the defense to a fair trial and, as the Court of Claims properly found, cumulated to a denial of due process of law. By failing to comply with the requirements of the Jencks Act to produce statements of a key prosecution witness, or strike the testimony of the witness, the trial court allowed crucially

damning testimony to serve as the basis of conviction. In this case the circumstance that the key witness had changed his testimony, while receiving the benefit of an honorable discharge, deferred until the accused had been convicted, made access to the witness' initial interrogation of crucial importance to the defense. No other avenue was open to probe that interrogation than defendant's Jencks Act rights, which were violated.

This denial of access to key defense evidence, and the Navy's refusal to explain the absence of such evidence, pursuant to the ruling of the Law Officer, constituted a denial of due process within the holdings of a long line of cases of this Court imposing duties on the prosecution and the trial judge to make material evidence, within the control of the prosecution, available to the defense. Under the circumstances, it cannot be said that the failure to produce such evidence, or strike the testimony of the witness, was harmless error, as this Court applies that doctrine in constitutional cases.

2. The Court of Claims, and this Court in review of Court of Claims determinations, are by no means barred by Article 76 of the Uniform Code of Military Justice from collateral review of constitutional error in military proceedings. The legislative history of that and predecessor enactments is clear, that pre-existing forms of collateral review were never intended to be foreclosed. Such a role has been played by the Court of Claims since the 19th century, always with the sanction of this Court. In this context, the notion of "finality" in Article 76 means no more, as this Court has found, than that military remedies must be appropriately exhausted before collateral attack will lie.

Moreover, a contrary interpretation of legislative intent would raise serious constitutional questions, which this Court has always attempted to avoid in the construction of Acts of Congress and may appropriately do in this case.

At the root of this consideration is the likelihood that the foreclosure of all access to an Article III court for a serviceman, for whom the accident of punishment has removed the avenue of habeas corpus, would be contrary to the deepest principles of the constitution.

3. The Court of Claims' decision in *Augenblick* rests on solid and appropriate grounds with respect to the proper jurisdiction of that court and its relationship to the military. In determining that constitutional error occurred, the Court of Claims applied the modern concept of jurisdiction pronounced in *Johnson v. Zerbst*, 304 U. S. 458 (1938), in which constitutional error is fully appropriate to the scope of collateral review. Moreover, the review of the Court of Claims fully conformed to this Court's standards for collateral review of military proceedings articulated in *Burns v. Wilson*, 346 U. S. 137 (1953), namely that the civil court consider whether the military tribunal had given full and fair inquiry to the defendant's constitutional claim. The Court of Claims properly determined that the military proceedings had not conformed to this constitutional standard. On balance, the Court of Claims determination in this case stands as a wholly salutary correction of flagrant constitutional abuse.

ARGUMENT

I. THE COURT OF CLAIMS PROPERLY FOUND REPEATED ERRORS UNDER THE JENCKS ACT IN COMMANDER AUGENBLICK'S MILITARY TRIAL AND PROPERLY HELD THAT, *UNDER THE CIRCUMSTANCES*, THESE VIOLATIONS "CUMULATED TO THE DENIAL OF A MINIMALLY FAIR TRIAL", IN VIOLATION OF DUE PROCESS

A. With Respect to the Burden of Demonstrating Bad Faith, the Refusal of the Trial Court to Examine Agent Mendelson, the Denial of *In Camera* Inspection of Agent Mendelson's Notes, and the Failure to Preserve the Notes for Appellate Review, Commander Augenblick's Trial Violated the Jencks Act.

The determination of the Court of Claims that Commander Augenblick's conviction and sentence were invalid was expressed in its finding of errors on Jencks Act issues, which it said

> "mount to a constitutional defect which grows directly from, and is entwined with, erroneous legal rulings by the law officer and the Board of Review." 377 F.2d at 593 (A-319).

This Argument IA deals with the erroneous legal rulings, which Argument IB treats in the constitutional perspective in which, the Court of Claims found, these errors "cumulated to the denial of a minimally fair trial." 377 F.2d at 605 (A-339).

1. *The Court of Claims properly found that the Military Proceedings had applied an erroneous rule of law in placing the burden of demonstrating bad faith destruction of Jencks Statements on the defendant.*

The most glaring error with respect to Jencks Act issues and, indeed, the error which transcends and colors all the errors of this case, was the imposition on the *defense* of the burden of proving that the missing tape recording had been suppressed by the prosecution in bad faith. The imposition of that burden was made in specific terms by the Naval Board of Review, in affirming the Jencks ruling of the trial court with respect to the tape. The Board said –

> ". . . it was the responsibility of counsel for defendants [sic] to pursue ascertainment of correctness of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government." (A-38).

The Board of Review had substantiated this applicability of this patently erroneous rule to Commander Augenblick's trial by its finding –

> "In the case at bar there was no resistance to producing the tape recording, it was the failure to find the recording, nor [sic] is there any evidence of destruction or bad faith or deliberate refusal to produce, as suggested by appellant in his supplemental brief. All of the witnesses were under oath and we cannot without substantial evidence to the contrary, hold that there was a deliberate refusal to deliver the tape or that these government employees were guilty of gross negligence of a degree requiring corrective action on our part." (A-37-8).

That this erroneous standard was applied by the *trial court*, in its own determinations, notwithstanding its bland assertions to the contrary[19] is made clear by both the Board of Review's sanction of the Law Officer's rulings, and, as will be shown, *infra*, those rulings themselves.

Once the existence of a "statement" within the meaning of the Jencks Act is shown – as Agent James made abundantly clear had been the case with respect to the tape which he had made on January 12 – the cases very clearly establish that the burden rests on the *prosecution* to demonstrate that any unavailability or destruction is devoid of bad faith and in accordance with the prosecuting authorities' routine policies. This Court enunciated this most sensible rule in *Killian v. United States*, 368 U. S. 231 (1961). The key factual determination in these situations is whether the statement was

> "destroyed by the Agents in good faith and in accord with their normal practice." 368 U. S. at 242.

---

[19] The Government now contends (Gov. Br. 67-68) that what the Law Officer did was diametrically opposite to what the Board of Review *said* the Law Officer did, and the basis on which it affirmed his rulings upon review of the transcript. In so doing, the Government relies on the Law Officer's claim that "I feel that it is upon the Government to produce or explain why it doesn't produce." (Citing A-255). But truer tests of the rule of decision in the military proceedings are how the Law Officer actually ruled on Jencks issues, and the basis on which the Board of Review fully satisfied itself that he had properly conducted the trial. In these circumstances, no amount of judicial dictum by the trial court could launder what the trial court actually did.

The reason that this burden must be borne by the Government is obvious and just:

> "The facts which remain to be determined regarding the existence, form and content of the notes [the controverted Jencks materials] *were peculiarly within the knowledge of the Government* and it was improper to impose the burden of a more precise demonstration upon the Defendant." *Ogden v. United States*, 303 F.2d 724 (C.A. 9, 1962) at 737 (emphasis supplied).

Under varying facts, the rule requiring the *prosecution* to demonstrate that non-compliance with its duty to disclose is not in bad faith has been repeated by all courts faced with this non-compliance: *Ogden v. United States*, 303 F.2d 724, 737-38 (C.A. 9, 1962); *United States v. Hilbrich*, 232 F. Supp. 111, 115, 130 (N. D. Ill., 1964), *aff'd.*, 341 F.2d 555 (C.A. 7, 1965), *cert. denied*, 381 U. S. 941 (1965); *United States v. Crosby*, 294 F.2d 928, 950-51 (C.A. 2, 1961), *cert. denied, sub nom. Mittelman v. United States*, 368 U. S. 984 (1962); *United States v. Tomaiolo*, 317 F.2d 324, 327-28 (C.A. 2, 1963), *cert. denied* , 375 U. S. 856 (1963); *United States v. Thomas*, 282 F.2d 191, 193-4 (C.A. 2, 1960).

Significantly, the factual showing that the prosecution must make under these cases was not, and could not be, established by the Government in *Augenblick*. Even the most innocent destruction of *this* tape violated *Navy* procedures. It was quite clear from the testimony of Agent Mendelson himself (A-139), as well as from that of his superior, Agent Fason (A-157), and from Mendelson's colleague who made the tape, Agent James (A-152-3), that the official policy was to retain tapes which might be required for use at trial. Tapes were numbered as they were used for interviews, and the number placed in a log (A-222-4; 230-1). Thus, as noted by Judge Davis –

> "Even if the Hodges recording had been erased, the ONI still should have produced, and been able to produce, the properly numbered reel." 377 F.2d at 602 (A-334).

Nothing was produced – the tape, the reel, nor the log – at any stage of the proceeding. No wonder then, that the Naval Board of Review could justify, on this record, the totally unexplained destruction of the tape, only on its reasoning that the burden of proving the disposition of the tape had been properly placed on Commander Augenblick.

Under the proper standard, all that had been shown by the trial proceedings was that a tape, once made, was now not available, and that the Government had not discharged *its* burden as to the whereabouts of the tape. In this state of evidence, the correct rule would have been to strike Hodges' testimony, while the failure to do so could only have sprung from a misconception of the applicable Jencks Act standard.

2. The Court of Claims properly found that it was error for the Law Officer to deny the Defense's request to call Agent Mendelson to explain the disappearance of the Hodges tape.

At the conclusion of the out-of court testimony of witnesses brought forward by the prosecution to explain the unavailability of the tape, there was no shred of evidence before the Law Officer to justify the conclusion that a tape once known to have existed (A-217) was now, for some good reason, unavailable. To the contrary, the trial testimony showed that one Agent, Mendelson, was the last person known to have had custody of the tape (Testimony of Agent Fason, A-238). In these circumstances, the Court of Claims properly concluded that –

"failure to recall Mendelson for testimony bearing on these most important issues was error which substantially prejudiced the accused rights." 377 F.2d at 602 (A-335).

The basis for the Court of Claims determination that Mendelson could have cast crucial light on the whereabouts of the tape and that the failure to call him for these purposes substantially prejudiced Commander Augenblick's rights[20] is carefully set forth in the Court's opinion, and merits close reading. 377 F.2d at 601-2 (A-331-5). Suffice it to summarize his prior testimony at pre-trial as evasive ("I don't recall receiving a tape with Hodges' recording on it . . . (A-139)) and filled with false leads (he suggested that if he did not have the tape, "when the statement from Hodges came in, the tape was reused for another

---

[20] When the question of calling Mendelson regarding the tape of the Hodges interview arose for ruling the following puzzling facts *had been disclosed to the Law Officer*: Although Mendelson had been present at the interrogation of Hodges on the morning of January 12th and denied any knowledge of any recording of the interrogation (A-141), Agent James in the next room, who had consulted with Mendelson before the interrogation began, had stated unequivocally that he had taped the Hodges interview (A-145-8; 217). Mendelson denied ever having received this tape (A-139; 141), but his superior, Fason (who had testified at a pre-trial investigation that he had received the Hodges tape from James and had given it to another agent, Scinta) now changed his testimony at trial and testified he had given the tape to Mendelson (A-237). Another agent, Carroll, testified that when Mendelson left for Norfolk he had transferred four tapes to him (A-245-8), although those tapes never included the Hodges tape, leaving Mendelson the last known custodian of that tape. It was clearly shown that a search (by everyone except Mendelson, who was still at Norfolk) of both the Naval Weapons Plant and the ONI Headquarters in Arlington had failed to uncover the missing tape (A-221-2; 233-4), and that destruction of the Hodges tape would have been a violation of official policy in regard to materials which were needed for investigation or required for trial (A-157).

investigation" (A-140)), and his own zeal in the case had previously been put in serious question by the exposure of his liberties, on and off the witness stand, with the sworn statement of Officer Round (which had led to the aborting of Commander Augenblick's first trial). At the trial, Agent Fason's testimony that he had given the tapes to Agent Mendelson pointed the finger of responsibility more emphatically at Mendelson than ever before,[21] and rendered Mendelson's pre-trial testimony an utterly unreliable basis for determining Commander Augenblick's access to crucial defense material.

It was against these ambiguities that the Law Officer refused to grant the defense's request that Mendelson be brought from Norfolk, Virginia, to shed light on the disappearance of the tape. The Law Officer did so for two reasons, substantially the same reasons as now expressed by the Government in defense of his action. The first was that the Law Officer had read the pre-trial ("Peltzer") investigation testimony of Mendelson and deemed it unnecessary for him to be called because he had testified at the earlier proceeding. Second, he felt that calling Mendelson from Norfolk would delay the trial.

In each case where the obligation on the trial court under circumstances such as these has been discussed it has been made clear that the trial court must "conduct

---

[21] We do not advert at this point to the pressing need to call Mendelson for another purpose, for him to turn over his notes of the Hodges interview for an *in camera* examination. That is discussed later (see pp. 35-37, *infra*). With regard to the tape above an unmistakeable burden fell on the Law Officer to clear up the mystery of its disappearance with live testimony from Mendelson.

any inquiry" necessary to insure that proper discovery is made under the Act. Perhaps the most graphic definition of this obligation was set out by Justice Reed, sitting by designation in the Court of Appeals of the District of Columbia in *Saunders v. United States*, 316 F.2d 346 (C.A.D.C., 1963), where the defense sought notes of a Government attorney in interviewing prosecution witnesses. The Motion was denied by the trial court, erroneously as Justice Reed held, because –

> "The District Court has an affirmative duty to determine whether any such statement", [a producible statement] "exists and is in the possession of the Government." 316 F.2d at 347.

This duty supervenes the ordinary discretionary exercise of the trial court's judgment with regard to evidentiary matters –

> "Because the defendant often does not and cannot know whether any such statement exists, the Court must conduct *any inquiry* which is necessary to aid the Judge to discharge the responsibility laid upon him to enforce the statute." 316 F.2d at 349 (emphasis supplied).

The painstaking duty of inquiry imposed in the trial judge to insure that *all* materials conceivably with the purview of the Act are made available to the defense so that the defendant may fairly defend himself is exemplified by another holding in the same case. Justice Reed required the trial judge (on remand) to make inquiry under oath of police officers who had interrogated witnesses prior to trial to determine whether any verbatim notes of the interrogations had been made. It had been reported to the trial judge by the marshal, in an out-of-court inquiry of the officers during the first trial, that no such notes existed. Justice Reed frankly stated that –

> "On the basis of the record, it appears highly unlikely that any such statements were ever transcribed." 316 F.2d at 349,

but ordered examination of these officers under oath by the trial court to insure beyond doubt that no documents properly discoverable had been made which had not been turned over to the defense. See also, *Williams v. United States*, 328 F.2d 178 (C.A.D.C., 1963) (Judge Fahy declaring that it is the duty of the trial court to examine "all the evidence" before making Jencks' determinations) and *Ogden v. United States*, 303 F.2d 724 (C.A. 9, 1962), where the court clearly stated –

> "An affirmative duty is placed upon the trial court to secure the information which is necessary to a proper ruling on a particular request for production in the light of statutory purposes." 303 F.2d at 733.

The Law Officer in the Augenblick court-martial did not carry out his "affirmative duty" to secure "all the evidence" necessary to make his determination that the Navy would be excused from not producing the tape. The one inquiry which would have been most fruitful – that of the individual who had possession of the Hodges tape when it disappeared – was denied. Any discretion the Law Officer may have appropriately exercised was clearly vitiated by his failure to discharge his "affirmative duty" to get to the bottom of the whereabouts of the tape.

Instead, the Law Officer chose to rely on Mendelson's pre-trial statements, which not only created doubt about his role rather than resolved the issue, but which are legally insufficient and, indeed, in the circumstances, defective bases for Jencks determinations. In its Brief (Gov. Br. 65-70), the Government claims that the convening of the "Peltzer" pre-trial investigation of July 13, 14 and 17 (where four agents testified concerning the Hodges tape)

and the calling of another group of agents (not including Mendelson) at the second court-martial itself justifiably permitted the Law Officer to deny interrogation of Mendelson at the second court-martial.[22] This bland exoneration of what occurred reflects total misunderstanding of both Navy pre-trial proceedings and trial court obligations under Jencks.

To understand the nature of this pre-trial investigation it is necessary to understand what had immediately preceded it in this case. The *first* court-martial of Commander Augenblick had been terminated on May 3, 1961, because it had been disclosed that Mendelson had not told the truth in pre-trial proceedings when he had offered supposed "sworn statements" of civilian arresting officers (A-65-7). The case was then referred to the convening authority to determine what to do about the charges against Commander Augenblick. The convening authority ordered a Court of Inquiry to make recommendations as to the disposition of these charges. The Court of Inquiry (convened under Article 135 of the U.C.M.J.) was

> "for the purpose of inquiring into all the circumstances connected with the alleged act of misconduct . . . report its findings of fact, opinions and recommendations." (A-70-1).

This was the Navy's version of a probable-cause proceeding. Its function is not to find guilt or innocence, but simply whether Commander Augenblick should go to trial. Its recommendation

---

[22] "The transcript of these two hearings reveals a painstaking and thorough effort on the part of the Law Officer and the prosecution to discover what had happened to the Hodges' tape recording." (Gov. Br. 66).

> "That Commander Richard G. Augenblick, U. S. Navy, be brought to trial by general court-martial on the charges of violation of Articles 125, 133 and 134, UCMJ." (A-87).

makes it incontestable that this was a probable-cause proceeding, analogous in civilian law to grand jury proceedings where the same form of determination is made.[23] Following the issuance of this recommendation, the "Peltzer" pre-trial investigation was convened. This investigation was convened under Article 32(c), U.C.M.J. That article provides that after investigation of charges (presumably completed by the Court of Inquiry):

> "(b) – no further investigation of that charge is necessary under this Article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf."

The "Peltzer" investigation was thus nothing more than a further hearing on the issue of probable cause of the "truth of the matter set forth in the charges." Article 32(a), U.C.M.J., 10 U.S.C. §832(a).

Now the Government openly tells the Court that Mendelson's presence and questioning at the Court of Inquiry and the "Peltzer" show-cause proceedings satisfied the "affirmative duty" of the trial court to conduct "any inquiry" necessary for him to discharge the duties placed

---

[23] Or, perhaps, to the civilian preliminary hearing, since defense counsel are permitted to be present and question prosecution witnesses. The point is: the issue is probable cause, not guilt or innocence.

on him by the Jencks Act. It could not have done so. The issue before the Court of Inquiry and the "Peltzer" investigation was whether the Government had enough evidence to proceed to trial. Leagues apart from *that* determination is the one which a *trial court*, and only a trial court can make. Whether the Government should be required to produce a witness to explain destruction of producible materials, necessary for a proper defense, is not a proper pre-trial question.

Until the witness whose credibility is at issue has been placed on the stand at trial there are no Jencks issues, and as the statutory scheme makes clear, the defendant has no Jencks rights, no obligation falls upon the prosecution to produce Jencks statements or suffer striking the testimony of its witness, and the court has no power to order production of Jencks statements and no obligation to protect defendant's rights. Thus, whatever Mendelson said at the various show-cause proceedings could in no way discharge the trial court's "affirmative duty" to "conduct any inquiry" necessary to discharge his duties under the Act. In the show-cause proceedings the issues are different, the standard placed on the prosecution is obviously less stringent than at trial (since it is concerned solely with whether there *will be a trial*), and the measured sanctions of the Jencks Act are not available simply because application of the Act would be legally premature.[24]

---

[24] The very most that could have happened at the pre-trial proceeding was a determination that so much unfairness had then been manifested that it was improper to try Commander Augenblick. There was no way that any meaningful Jencks Act findings could have been made at that point because it was always open to the prosecution to attempt to try Commander Augenblick without Hodges' testimony – which, of course – it never attempted.

As to whether the calling of Mendelson would delay the trial: the second court martial of Commander Augenblick lasted from September 5 through September 13, 1961. The Law Officer's determination that Mendelson need not appear occurred on September 8th. Mendelson was not on Uranus; he was in Norfolk.[25] The impression is unmistakable that the Navy dearly wished he had been consigned to the former place.

Any number of witnesses, absent the crucial agent Mendelson, could be nothing more than a classic snipe hunt, without any snipe. The Navy had indeed produced Mendelson at the various probable-cause proceedings where the authorities could order nothing except to dismiss charges – which the Navy was patently unwilling to do – but then the Navy fought against producing him at trial where, for the first time, it ran the risk of Jencks Act sanctions of striking Hodges' testimony. The gamble paid off, but it was a gamble carried on with the defendant's rights. It never should have been permitted.

3. *The Court of Claims properly found that it was error for the Trial Court to deny an in camera examination of Mendelson's notes of the Hodges interrogation.*

When the Law Officer denied the defense's request for an *in camera* examination of Mendelson's notes (taken during his interrogation of Hodges), he had before him both Mendelson's own description of his notes (A-132-3), and the prosecuting counsel's representations to the court concerning them (A-209-12).[26] What is most startling

---

[25] In fact, Mendelson had appeared before the Jencks issues arose, without causing delay, at the "Peltzer" inquiry, even though he was then stationed at Norfolk (A-136).

[26] These statements appear verbatim in the Counterstatement, *supra*, p. 9, fn. 9.

about the Law Officer's ruling is not that he denied production of the notes to the defense, but that he did so, having refused even to look at the notes *in camera* before ruling on production, in flat defiance of Section (c) of the Jencks Act –

> "the court shall order the United States to deliver such statement for the inspection of the court *in camera*. . ." 18 U.S.C. §3500(c).

Every case in which this question has arisen has held that the trial court is obliged to examine, *in camera*, records of statements which *prima facie* raise questions of producibility – as these interview notes demonstrably did. In *Killian v. United States*, 368 U. S. 231 (1961), this Court held that representations made by the Solicitor General of the United States to the effect that certain documents were not producible required testing by trial court examination. Surely, this same rule would apply to representations of the same sort made by Agent Mendelson. See also, *Bary v. United States*, 292 F.2d 53 (C.A. 10, 1961), where the court held that the "Government does not have the unilateral right to determine without judicial supervision whether [this] statement is a Jencks statement or not." 292 F.2d at 58. See also, *United States v. Keig*, 320 F.2d 634 (C.A. 7, 1963); *United States v. Thomas*, 282 F.2d 191 (C.A. 2, 1960), and *Hilliard v. United States*, 317 F.2d 150 (C.A.D.C., 1963). In *Palermo v. United States*, 360 U. S. 343 (1959), the determination that notes were not a Jencks statement could be made only after examination of the notes by the trial judge.

The precise nature of the *in camera* examination required of the trial court was the subject of the exhaustive judicial inquiry in the two cases of *Campbell v. United States*, 365 U. S. 85 (1961) and 373 U. S. 487 (1963). In the first *Campbell* case the trial court, *after reading the notes*, held them non-producible. After the Court

of Appeals had affirmed, this Court held that the function of inquiry where interview notes are involved goes beyond a mere reading and requires the taking of testimony to determine if the interview notes are actually a substantially verbatim account of what the witness said. Certainly, this required exercise must *begin* with a reading of the notes by the trial court.

The Government feels this matter is discretionary with the trial judge. It may well be. But, surely, the element of such discretion can only begin with the reading of controverted notes such as those described by Mendelson and the prosecution in this case.

4. Further Jencks error was necessarily committed when the Interview Notes were not incorporated within the trial record for examination by the appellate courts.

A further violation of the Jencks Act necessarily followed from the refusal of the trial court to take the threshold step of examining Mendelson's interview notes. The Jencks Act requires that –

> "If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purposes of determining the correctness of the ruling of the trial judge." 18 U.S.C. §3500(c).

The Act hence makes mandatory the preservation in the record of portions of Jencks Act statements determined to be non-producible by the trial court. In denying production of these notes for *in camera* inspection, the Law

Officer thus bred the further mischief of truncating the record for any rational appellate review of his ruling. The law requires a complete record be preserved so that review may be meaningful and an erring trial court can be corrected if necessary. In *Augenblick*, however, we are left only with the Government's speculation concerning these notes. On this question, the opinion of the Board of Review and subsequent military appellate proceedings are, therefore, based on as unsustainable grounds as the Law Officer's own erroneous ruling.

And this, it is submitted, is precisely the posture the Navy so assiduously desired and sustained until the Court of Claims cast its scrutiny on the whole affair.

B. Under the Circumstances of the Augenblick Trial, These Jencks Act Errors Constituted A Denial of Due Process.

1. *The circumstances of the court-martial squarely raised the possibility that the testimony of the Witness Hodges may have been bartered for favorable treatment, but the Jencks Act violations frustrated the use by the defense of that possibility to impeach Hodges' testimony.*

The Court of Claims was quite clear in stating that every violation of Jencks was not, *ipso facto*, a violation of constitutional due process, 377 F.2d at 604. It went on to find, however, that the Jencks violations *in this case*, in the context of facts undisputed on the record, so tainted the treatment accorded this defendant during his court-martial that:

> "He was denied a necessary step toward obtaining, or discovering the status of material of first rank, for his defense." 377 F.2d at 606 (A-342).

A denial which, the Court held –

"seriously impeded his right to a fair trial in violation of the Due Process Clause of the Constitution." *Ibid.*, at 606-7 (A-342).

The following elements establish a consistent background of suppression of key evidence, rendering the defense powerless to raise a defense of crucial importance to its case.

(a) *The Importance of Hodges' Testimony.* The first of the disturbing circumstances that compelled the Court of Claims to question whether Commander Augenblick had received a fair trial was the crucial nature of Hodges' testimony to any conviction.

Hodges was more than just a key witness; he was the *sole* witness and participant in a private sex offense. When the Commander was charged, it was clear to the Navy that it would have to rely on Hodges' testimony, and his testimony alone, to prove the sodomy which was originally charged (A-63-4), see, *supra*, pp. 10-11, fn. 13), and which remained the gravamen of the case against Commander Augenblick until the last day of his second court-martial nine months later, when he was acquitted of sodomy and found guilty of a lesser included offense of which aberrant sexual conduct was the gravamen. This key dependence on Hodges' testimony was doubtless manifest to the Government as soon as it began to marshall the statements of Commander Augenblick, Airman Hodges and the arresting officers on January 12, 1961, at the very outset of the preparation of the Government's case. Were the prosecution to present compelling evidence of the gravest charge it might bring against Commander Augenblick, no witness other than Hodges was available.

There and then, the importance of Hodges to the Navy case was fixed. Simultaneously, the Jencks inquiry into what occurred during that early morning interrogation of Hodges became a matter of great significance to the defense. Moreover, Hodges was undeniably young and frightened, as the Court of Claims noted, 377 F.2d at 605

(A-339), and as any understanding of the man's situation would vouchsafe. His early-morning inconsistencies[27] and his subsequent role in the prosecution may well have sprung from what must have been a terrifying confrontation with military authorities, rife with potentially baleful consequences to him, whether or not any indecencies had in fact taken place.

In the course of subsequent events, the importance of Hodges' testimony to the prosecution which the Government now contends most strenuously the Naval court-martial wholly disbelieved,[28] can best be seen from the comments of the majority of the Naval Board of Review:

> "Furthermore Airman Hodges testified during the first pre-trial, Court of Inquiry, second pre-trial and the second trial. He withstood vigorous cross-examination by the defense. His testimony did not waiver." (A-37).

It was precisely because Hodges' testimony (necessarily devoid of cross-examination on what had transpired between him and his interrogators during his early-morning post-arrest interrogation) stood up so well that the majority of the Board of Review decided to ignore the Jencks contentions raised by the defense.[29]

---

[27] Hodges first denied that "anything happened" and later recanted, claiming *coaching* from Commander Augenblick on the way to the ONI interrogation (A-73; 190-2).

[28] Indeed, the thrust of the Government's case in this Court is that the Jencks violations never prejudiced Commander Augenblick because no one ever believed Hodges (Gov. Br. 72-74).

[29] Indeed, the court-martial finding of guilt of Article 125 of the U.C.M.J. contained a finding that the Commander *knowingly* and *wilfully* placed his head in close proximity to the exposed privates of the Airman (A-309). Respondent defies the Navy to find one shred of evidence supporting the *scienter* required for that finding – save in Hodges testimony.

(b) *The Nature of the Alleged Crime.* Much as the significance of the Jencks violations depends on the importance of Hodges' testimony to the Navy's case, it also grows out of the private nature of the offense charged, and the awful consequences of this charge to a career Naval officer. Again, it must be emphasized that the Navy's charge against the Commander throughout was sodomy and that his conviction was on a no less heinous sex offense. The words of Judge Davis define the agonizing evaluation that finders of fact must undertake when confronted with charges so devastating, yet, so entirely founded on one man's word:

> "Like other sex crimes, the accusation here, the heinous crime of sodomy, is not difficult to utter, but arduous to defend against. It is not unknown for such charges to be concocted by frightened, psychologically disturbed, perverted, or greedy individuals. Testimony revealed that, so far as was known, this accused never previously acted in the manner charged and has been and continues to be held in the highest esteem by his fellow officers. But such evidence can be insufficient in the face of direct and explicit accusations of unnatural conduct." 377 F.2d at 600. (A-340).

Given this circumstance alone, inquiry into statements made by the single accuser immediately after arrest takes on significant importance. For the accuser has the reputation of the accused in his sole power with nothing save the accuser's own words to give the lie. Inquiry into those words, where the accusation is of society's most private offense, and where the accusation *itself* does such open, public damage, may be the accused's only real protection. In this case such inquiry was the accused's only recourse, and that avenue was denied him.

(c) *The Participation of Agent Mendelson.* The most damning refutation of the Government's cavalier defense of the Jencks errors (mere defects in "procedure" . . . no allegation here of "deliberate suppression," (Gov. Br. p. 64)) lies in the pattern of obfuscation spread on the record by the architect of the Navy's difficulties herein, Agent Mendelson. He is as entwined in these Jencks Act violations as the prosecutors who kept him out of sight and earshot of both of the courts which tried Commander Augenblick.

Mendelson came to the Jencks issues in this case with a record of unreliability on the stand already clearly established. Mendelson's peregrinations from the truth with respect to whether he had taken the oath of police officer Round, as Mendelson testified he had (A-61) and Round testified Mendelson had not (A-60), had caused the dismissal of a first court-martial called to try Commander Augenblick (A-66-7). Long before there were any Jencks problems involving Mendelson, he had made his first notable appearance in the record.

Mendelson's subsequent activities during the "Peltzer" investigation show that the Agent did everything he could to elude the search for the tape. Under oath he would not admit that a tape was taken (A-132-5); his colleague, Agent James (with whom Mendelson had consulted in advance of the Hodges interview and whom Mendelson knew was in the area (A-138-9)), openly rebutted him (A-146-7).

Mendelson then denied any recollection of having possession of the tape (A-141), though his superior, Agent Fason, subsequently brought out the truth – that he had given the tape to Mendelson (A-237-8). And the record is entirely clear that while the tape was in Mendelson's hands it disappeared (A-287-8); 377 F.2d 602 (A-334).

The conduct of the prosecution is obviously of grave moment in this case. Mendelson's activities must be charged to the prosecution. *Barbee v. Warden of Md. Penitentiary*, 331 F.2d 842 (C.A. 4, 1964). His record speaks for itself, and casts substantial doubt as to the fairness with which the prosecution discharged its obligation to do justice.[30] Mendelson's participation in the Augenblick prosecution constitutes yet another element raising clear Jencks violations to the level of pervasive unfairness.

(d) *Hodges' Favored Treatment.* Of all the elements which cast grave suspicion and doubt on the fairness of Commander Augenblick's trial, the treatment of Hodges is foremost. It is not idle that Hodges was never even put on trial, although if any of his own testimony is to be believed, he was in *pari delicto* with the defendant. Military custom may justify *some* disparity in punishment under conditions such as these, but there is no justification whatsoever for the promise of an *honorable* discharge to this man when the cause of his separation (if we are to accept his own accusation) was his own sexual misconduct. The determination that he be given such

---

[30] It strikes us as a singular effort on the part of Judge Davis to remain moderate when he stated:

> "It was evident, we stress, from his earlier testimony, that Mendelson was not a witness whose prior statements could be accepted at face value. Other testimony indicated, also, that he was best positioned to inform the Court of the disposition of the tape recording. It had been directly traced into his hands by the evidence of James and Fason. As the agent who apparently had physical control of the tape during the period in which it disappeared, his testimony was very important to the Government in meeting its burden of good faith destruction or loss." 277 F.2d at 602 (A-334).

favored treatment was made at a time when the Airman had served out only twelve and one-half months of a four-year enlistment (A-75). Either the Service wanted him out prematurely, or *he* wanted out of the Air Force before his hitch was up. If the Air Force wanted him out, its choice of discharge is striking. If Hodges wanted to get out of the service, he certainly carried off his mission both unscathed and with notable success. In either event, the turn of events for Hodges belies any concept of appropriate and reasonable disparity of punishment.

Hodges simply was not punished; although he was kept on in the Air Force for *seven months, after it had been determined to issue him an honorable discharge and he had been told so* (A-75; 261-2). If it was necessary as a matter of discipline to discharge Hodges at all, the only explanation as to why this compromised young man was kept at liberty in a military installation (A-74) for seven months must be the dangling before him of an honorable discharge until he had served the Navy's purposes. Then, within one week of the court-martial verdict against Commander Augenblick, Hodges was discharged.[31]

Hodges' central importance to that verdict has been carefully underlined by the Navy Board of Review (*supra*, p. 10). Hence, insofar as Commander Augenblick's Jencks rights were concerned, Judge Davis could not have been better justified in determining that Hodges' treatment by the Navy made it "very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session." 377 F.2d at 605 (A-340).

---

[31] See Counterstatement, *supra*, p. 5.

(e) *The Wall Thrown up around Hodges Interrogation.* Yet, it was this very interrogation session around which centered the persistent violations of Commander Augenblick's Jencks rights. In five separate ways, the Navy, by action of its prosecutor, Law Officer, and Board of Review, assiduously kept the defense from access to any record of what had transpired between Hodges and Mendelson during this vital interview. First, Mendelson consistently tried at the pre-trial to persuade that no tape recording had ever been made (see, e.g., A-132-5). Next, when this became an obvious absurdity, the tape simply turned up missing while in Mendelson's possession and the Navy pressed the Law Officer to leave things just that way (A-193-201). Third, the enigmatic Mendelson was kept from the hearing room in the effort to find the tape (A-255), barring the court from examining his demeanor and credibility. Fourth, Mendelson's notes of his questioning of Hodges during the same crucial interrogation were withheld from examination by anybody. Fifth, and finally, the Navy's Board of Review justified the whole procedure by determining that if there were any bad faith in what had transpired, it was up to Commander Augenblick (aided by an accused defendant's well-known access to the inner operations of Naval Intelligence, it should be stressed with irony) to demonstrate this bad faith.

A wall was thrown between Commander Augenblick's lawyers and any document, tape or tangible source of evidence that would cast light on what Hodges and Mendelson said to each other in their first interview. This wall was essential to Commander Augenblick's conviction, and the Navy maintained it intact throughout the military proceedings.

(f) *There were no Alternative Means of Inquiry into what Occurred.* It is clear from the record that no other means of discovering whether Hodges had been compromised were open to the defense. The tape and the notes were essential to this inquiry, and these were kept beyond the grasp of the defense. Mendelson was kept from the

stand, the Law Officer refusing to call him for testimony. Another agent, Connor, was present in the Interrogation Room, but discovery under the Jencks Act is not satisfied by the testimony of a *collaborating* prosecution agent who happens to be in the room during the grilling of the witness. It is the witness' *own words*, recorded in notes and tapes, that was the goal of Jencks discovery. The defense could look nowhere else for these materials.

These were, indeed, "materials of first rank for [Commander Augenblick's] defense."

2. *Under these circumstances, suppression of Jencks Act discovery prevented Commander Augenblick from asserting a vital defense at his court-martial, and his right to due process of law was thereby violated.*

As the legislative history of the Jencks Act demonstrates[32] and as Justice Brennan forcefully pointed out in his concurring opinion in *Palermo v. United States*, 360 U. S. 343, at 362-3 (1959), discovery rights in all federal criminal proceedings have a close nexus to basic constitutional guarantees. Mindful of this background, the Court of Claims in *Augenblick* examined the special circumstances of the particular case before it to determine whether the denials of discovery stood merely as statutory violations or became a pattern of suppression violative of the Constitution. Judge Davis found that the circumstances of *Augenblick*, enumerated in detail in the immediately preceding section, raise suppression of Jencks rights in this case to the level of an elementally unfair trial. In so doing, the Court carefully analyzed these special circumstances, and found unfairness, a court-martial that deprived a defendant of "materials of first rank for his defense." 377 F.2d at 606 (A-342). The distaste manifest in the court's unanimous decision for a record redolent of suppression

---

[32] See 103 Cong. Record, 15933-4, 15928, 16487-9, 16738 (1957).

of lawful inquiry is a moving condemnation of the manner in which the Navy abused Commander Augenblick's rights to a fair trial.

This conclusion was reached against the background of a long line of this Court's decisions embracing the handling of evidence within the control of the prosecution in a criminal trial. Commencing with *Mooney v. Holohan*, 294 U. S. 103 (1935), and extending chronologically through *Pyle v. Kansas*, 317 U. S. 213 (1942), *Alcorta v. Texas*, 355 U. S. 28 (1957), *Napue v. Illinois*, 360 U. S. 264 (1959), *Brady v. Maryland*, 373 U. S. 83 (1963), and *Giles v. Maryland*, 386 U. S. 66 (1966), this Court has challenged convictions based on suppression of evidence favorable to the defense. In each of these cases the prosecution had kept from the defendant "materials of first rank for his defense." Prejudice to the defendant was found in the use of perjured testimony in *Mooney*; the coercion of a prosecution witness in *Pyle*; the fact that a crucial witness was the paramour of the defendant's slain wife (pivotal in reducing murder to a lesser crime) in *Alcorta*; and improper arrangement for testimony between the prosecution and a key witness for the State in *Napue*; the admission of the murder by an accomplice in *Brady*; and police reports indicating substantial inconsistencies in testimony by the alleged rape victim in *Giles*. In these cases, this Court proscribed the knowing use by the prosecution of false testimony and inaction by the prosecution when testimonial defects became known to it, where such evidence

> "is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." *Brady v. Maryland*, 373 U. S. 83, at 87,

or may have "an effect on the outcome of the trial." *Napue v. Illinois*, 360 U. S. 264, 272. See also *Fahy v. Connecticut*, 375 U. S. 85, 86-7 (1963), and Mr. Justice

Fortas' concurring opinion in *Giles*, 386 U. S. at 9. It is quite clear that, in setting such standards of discipline for the prosecution with respect to evidence in its control, this Court's basic concern has been that the defendant not be prevented from raising a defense so useful and important as whether Hodges' testimony had been improperly procured.

It was to this concern and within these standards that the Court of Claims directed its unanimous holding of constitutional error. Surely, if due process requires that the prosecution make available evidence favorable to the accused uniquely known to the prosecution and within its control, it also requires that the prosecution produce, or explain the unavailability of, such evidence that the defense may happened to have ascertained once existed no less uniquely within the prosecution's custody. Indeed, in *Augenblick*, the prosecution has never made the explanation of what happened to the tape that it alone can make, and its refusal in the face of the defendant's Jencks Act rights has been at least as contumacious as the prosecutorial misconduct so firmly barred by this Court.

In real terms the denial is no different from those described in this Court's holdings above. *From the viewpoint of the defendant* is there any meaningful distinction between being deprived of all access to materials from which a vital defense may be raised (as occurred here), and being deprived of existing evidence which favors him? To be sure, the prosecution faces discipline in the latter situation, but in terms of the *rights of the defendant*, is the former deprivation less fatal to his defense than the latter? Can due process (as this Court has repeatedly held) guarantee the defendant the right to use evidence which may be favorable to him if the defendant's power to discover its existence (itself guaranteed by statute whose commands are never far from constitutional guarantees) is not similarly guaranteed? All of the suppression and impropriety

found in the convictions reversed by the Court in the cases cited above would stand unchallenged if the defendant's right to inquire into the existence of this evidence (if he happened not to be aware of it) were not accorded some protection.

This is not to say that in every case this right to inquire holds the same constitutional protection as the right to use of the evidence itself. Obviously, if no right to discovery exists (as in most state courts) there is nothing to which constitutional sanctity can attach, but here Jencks Act rights are guaranteed by law. Where every conceivable step is taken to shield the testimony of the principal accusing witness from inquiry into investigative interviews directly following arrest, when that testimony is tinged with traces of bartering, then the denial of discovery must surely rise to the same level of unfairness as suppression of evidence itself. Due process, in these circumstances, is surely violated.

Nor can the prosecution take shelter in fulfilling its own constitutional responsibilities by claiming that the errors here with respect to the tape and the notes are the errors of the Law Officer, not the prosecution. This Court has clearly declared that trial courts themselves must conform to the demands of the due process clause in the weighing of an accused's rights to evidence in the prosecution's control which is important to his defense. See *Brady v. Maryland*, 373 U. S. 83, 87 (1963); *United States v. Reynolds*, 345 U. S. 1, 6 (1953); *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, 469 (1951). As the Court of Claims found –

> "This constitutional inquiry is integral to our system under which the Government which prosecutes an accused also shares the responsibility of assuring that justice is done. *Jencks v. United States*, . . ., 353 U. S. [657] at 671 . . ." 377 F.2d at 604.

No one will ever know whether Hodges was ever offered any improper inducement by the Navy to testify against Commander Augenblick. Yet, the record of this court-martial is redolent with evidence pointing to gross irregularities. These irregularities start with clear violations of the defendant's rights under law (the Jencks violations). They go on with factual circumstances pointing directly to the prosecution's use of vital testimony that was improperly bargained for. Manifestly, the Court of Claims had enough before it to exercise the consciences of all seven of the judges. Under these circumstances the Court of Claims properly assumed the obligation of inquiry into whether due process had been done the defendant.

In its ruling, the Court of Claims limited the Constitution's application to Jencks discovery within exceedingly narrow bounds. Obviously, no intimations arise from its holding that constitutional protection may extend beyond this case to situations (as in many states) where the statutory Jencks mechanism does not apply and where the implications of suppression may not be as significant as they were to this defendant. Moreover, it is obvious, too, that the conclusion of constitutional error may not follow similarly in other cases where the record is not as replete with full-blown legal error as it is in *Augenblick*.

3. *The Government attempts to minimize the significance of the prejudicial errors in Augenblick, in total disregard of both the obvious importance of Hodges' testimony and the determinations of this Court.*

No amount of rationalization of the court-martial's ultimate determination of Commander Augenblick's case (see Gov. Br. 72-74) can minimize the crucial role played by Hodges' testimony, both in the Navy's decision to bring the defendant to trial, and in the final determination of his court-martial.

Hodges was obviously the key prosecution witness. So testified the officer charged with reviewing the charges against Commander Augenblick (see, *supra*, pp. 10-11, fn. 13), and so held the Board of Review when it satisfied its own erroneous criteria by observing that Hodges stood up well as a witness in spite of cross-examination (A-37, 43, 46, 61, 69, 72). Moreover, the Board of Review also buttressed its appellate affirmance of Commander Augenblick's conviction of a lesser offense to that of sodomy in resolving inconsistencies within the stories of the arresting police officers by relying on Hodges' testimony as corroboration of the essential thrust of the officers' testimony. As the Board specifically said:

> "From the reading of this testimony we must disagree with the appellant's contention that Airman Hodges' and the police officer's [sic] were impeached by inconsistencies in their stories" (A-47).

Notwithstanding these clear indications that Hodges' testimony was vital to the conviction, the Government suggests that the error, such as it may be in this case, does not measure up to the standards laid down by this Court in *Chapman v. California*, 386 U. S. 18 (1967), in that any error "cannot fairly be said, beyond a reasonable doubt to have been harmless." (Gov. Br. 74). But applying that standard to this case,[33] prejudicial error is

---

[33] Thus, the Government seeks to engage this Court in an exercise that requires that the Court weigh and examine evidence in the record under the *Chapman* doctrine, applicable in its terms only to the certiorari jurisdiction of this Court to review error in state court cases – a contention that flies in the teeth of every assertion the Government has made as to the scope of civil court review of military convictions.

clear, since it cannot be said that Hodges' descriptions of the events of the night of January 11-12, 1961, did not, beyond a reasonable doubt, contribute to the result. If the bearing of Hodges' availability on the decision to bring Commander Augenblick to trial and the determinations cited above by the Board of Review as to Hodges' importance be insufficient, surely the fact that Hodges alone could testify to circumstances substantiating the "knowingly and wilfully" specification is determinative.

Assuming then that Hodges was a witness of some significance, this Court's determinations with respect to Jencks situations make all contention groundless that the specific Jencks errors may have been "marginal." (Pet. 19). Under both the *Jencks* case and the Jencks Act, the requirement for the production of statements within the scope of that Act is mandatory. *Bergman v. United States*, 253 F.2d 933 (C.A. 6, 1958); *Lehman v. United States*, 252 F.2d 951 (C.A. 6, 1959); and *United States v. Prinz*, 264 F.2d 850, 852 (C.A. 3, 1959). While the notion of "harmless error" has received a narrow and limited applicability by this Court in assessing Jencks Act violations – see *Rosenberg v. United States*, 360 U. S. 367 (1959), where "the very same information [in withheld documents] was possessed by defendant's counsel as would have been available were error not committed", 360 U. S. at 371 – that doctrine has manifestly no application to this case.

Here, the barring of Augenblick's only possible access to the circumstances surrounding a possible arrangement for testimony was a total and material deprivation. As such, it fits precisely the holding of this Court that *Rosenberg* does not apply where notes (subsequently destroyed) and an Interview Report were withheld, thus obviating all possible review of their contents. *Campbell v. United States*, 373 U. S. 487 (1963). In *Campbell II*, this Court said –

> "Understandably, no contention has been made that the refusal to produce the Interview Report can be deemed harmless error under the principles laid down in *Rosenberg v. United States*, 360 U. S. 367 [1959]. Cf. *Gordon v. United States*, 344 U. S. 414 [1953]." 373 U. S. at 497, fn. 14.

And in *Gordon*, the reason for eschewing all balancing is made clear –

> "[F]or rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, was harmless." 344 U. S. at 420.

Here, for this Court or any appellate court to weigh the precise balance between what evidence the prosecution chose to put forward and what evidence was withheld could only constitute an exercise in futility by engaging in speculation foreign to the "fairness in criminal procedures, which the Jencks Act was enacted to secure". *Campbell II*, 373 U. S. at 496-7, citing *Campbell I*, 365 U. S. at 92.

The Respondent simply contends, as this Court held in *Clancy v. United States*, 365 U. S. 312 (1960), that –

> "Since the production [of at least some of the withheld documents] was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." 365 U. S. at 316.

In the face of this valid prophylactic rule, the Jencks violations are clear-cut, and undeniable. The significance of these errors, in constitutional terms, must thus be measured, as they have in this Argument IB, against their

impact on the ability of the accused to raise an essential defense. As shown, that impact was, indeed, grave and prejudicial.

II. ARTICLE 76 OF THE UNIFORM CODE CANNOT BAR COLLATERAL REVIEW IN THE COURT OF CLAIMS AND, UPON CERTIORARI, IN THIS COURT

When the Court of Claims entertained review of constitutional error in *Augenblick*, it did no more and no less in review of the actions of courts-martial than it has always done, virtually since its first creation by Congress (Act of February 24, 1855, c. 122, 10 Stat. 612) and, for almost ninety years, *always with the sanction of this Court.*[34]

In these cases the Government challenges this long-standing jurisdiction, asserting that Article 76 of the Uniform Code of Military Justice, enacted in 1950, now bars access to the federal civil courts, specifically the Court of Claims, and by certiorari, this Court. The Government's contention has never been heard on the merits in this Court, although there are inferences that this Court has

---

[34] *E.g., Blake v. United States*, 14 Ct. Cl. 462 (1878), 103 U. S. (13 Otto) 227 (1880); *Keyes v. United States*, 15 Ct. Cl. 532 (1879), *aff'd*, 109 U. S. 336 (1883); *Runkle v. United States*, 19 Ct. Cl. 396 (1884), *rev'd*, 122 U. S. 543 (1887); *United States v. Page*, 25 Ct. Cl. 254 (1890), *rev'd*, 137 U. S. 673 (1891); *Mullan v. United States*, 23 Ct. Cl. 34 (1888), *aff'd*, 140 U. S. 240 (1891); *Fletcher v. United States*, 26 Ct. Cl. 541 (1891), *rev'd*, 148 U. S. 84 (1893); and *United States v. Brown*, 41 Ct. Cl. 275 (1906), *aff'd*, 206 U. S. 240 (1907).

looked with favor on continuing Court of Claims jurisdiction to hear claims of constitutional error in courts-martial.[35]

A. Neither the Language of Article of War 50 and Article 76 of the Uniform Code, Nor their Legislative Histories Support the Government's Assertion that Congress Intended to Bar Court of Claims Jurisdiction.

The finality provision of Article 76 of the U.C.M.J. does not purport to bar review by the Court of Claims of the constitutional errors in *Augenblick*. The Court of Claims so found (377 F.2d at 591), on the basis of its examination of the legislative history of Article 76, but the Government denies this and contends that "this very legislative history reflects a clear purpose to confine collateral review to habeas corpus." (Gov. Br. 36). Even in its narrowest reading, that legislative history does *not* support the view that Congress intended to exclude traditional Court of Claims powers of constitutional review;

---

[35] Note the unambiguous words of praise for the determination in *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), in this Court's holdings in *Glidden Co. v. Zdanok*, 370 U. S. 530 (1962) at 557, per Harlan, J. ("In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately."), and of Mr. Justice Frankfurter in his separate opinion on rehearing in *Burns v. Wilson*, 346 U. S. at 847-8 (citing also, *Sima v. United States*, 119 Ct. Cl. 405, 96 F. Supp. 932 (1951). See also, *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982 (1964), *cert. denied*, 377 U. S. 977 (1964).

The Court of Claims treatment in military reviews since the passage of the U.C.M.J. differs in no respect from those that went before, *e.g.*, *Shapiro*. In each case, the touchstone is the presence of constitutional error, and the court has been the first to view such error "dispassionately" and decline to upset military convictions where none are to be found. See cases cited at footnote 63, pp. 86-87, *infra*.

moreover, the full record of extensive study and debate prior to the enactment of Article 76 and its predecessor, Article 50(h) of the 1948 Articles of War, makes it manifest that the petitioner places exaggerated emphasis on a few words of quick characterization taken out of the context of the complete legislative history.[36]

1. That the petitioner grossly labors the Congressional intent is made clear from two exchanges on the Senate floor occurring in the closing hours of debate on the U.C.M.J. Senator Wayne Morse opposed the bill (H.R. 4080) in part because he wanted it to provide a direct – albeit limited – avenue of appeal from the military courts to this Court. In support of his view, he introduced verbatim into the record an article[37] by Mr. Arthur John Keefe (one of the Department of Navy's key consulting experts in the post-war recodification) and Mr. Morton Moskin.

---

[36] The Government relies on the identical terse language of the Senate and House Reports on the Executive draft of the Uniform Code to each body of the Congress: "Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments." S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949). All of the preparatory studies and reports cited in this Argument II are available to the Court in the files of its library in excellent special compendia. See *Legislative History, Amendments to the Articles of War*, 80th Congress (1948) (two volumes), and *Legislative History, Uniform Code of Military Justice*, 81st Congress (1949) (three volumes).

[37] Keefe and Moskin, *Codified Military Injustice – An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 Cornell L. Q. 151 (Fall 1949), appearing in 96 Cong. Rec., part 2, pp. 1434-1441 (1950). Senator Morse asked the clerk to mark a copy of the article "for identification purposes," and said that he "should offer it as one of my key exhibits in support of the premises I am defending and advancing here this afternoon." 96 Cong. Rec., *supra*, p. 1435 (Feb. 3, 1950).

Their analysis included the following explicit comment on the effect of Article 76:

> "Article 76 restates the existing law as to finality of court-martial judgments. Following such review as the code provides, court-martial judgments 'shall be final and conclusive.'
>
> "Presumably they will still be open to collateral attack, either by petition to a Federal district court for a writ of habeas corpus or by a suit in the Court of Claims to recover such back pay as may have been withheld by way of punishment. . ." (96 Cong. Record, *supra*, p. 1439)

Then the authors went on to state their views that these traditional forms of collateral attack perpetuated in the Uniform Code were inadequate, since to "carry such appeals to the top of the Federal hierarchy of courts is so slow and cumbersome a process as to be of little practical value. . ."[38] (96 Cong. Record, *supra*, p. 1439).

---

[38] See also, the 1947 analysis of "Review by Civil Courts" in the *Report of the General Court-Martial Sentence Review Board of the Navy on Court-Martial Procedures and Policies* (1947), by Arthur John Keefe and Robert S. Pasley, commonly known as the "Keefe Report."

> "Review of court-martial proceedings in the civil courts normally takes the form of collateral attack, usually by petition for habeas corpus, occasionally by suit in the Court of Claims for back pay. The petition for writ of habeas corpus may be made at any stage of the proceedings, or afterwards, if the accused is still in confinement . . . Suit in the Court of Claims can of course only be brought after the sentence has been approved and the pay in dispute has been withheld or denied. Both types of action are subject to appeal to the Circuit Courts of Appeal, and to the United States Supreme Court. All this causes confusion, delay and uncertainty. In many cases,

(Continued)

The traditional avenues of civil review that Senator Morse thus sought to shorten and straighten, Senator Pat McCarran sought to make more explicit. As Chairman of the Judiciary Committee he asked for clarification from Senator Estes Kefauver, the floor manager of the bill in the Senate on behalf of the Armed Services Committee –

> "MR. McCARRAN. What does the bill mean when it says 'binding on all departments, courts, agencies, and officers of the United States'? Does not that attempt to bind the courts?"
>
> "MR. KEFAUVER. As I said, it is the same language as that which was in the Kem Amendment in 1948 [*i.e.*, Article 50(h) of the 1948 Articles of War, referring to their Senate sponsor]. It attempts to bind the courts on all matters except jurisdictional matters."
>
> "MR. McCARRAN. Why does it not say 'all matters except jurisdictional matters'?"
>
> "MR. KEFAUVER. The Humphrey case [*Humphrey v. Smith*, 336 U. S. 695 (1949)], of course decided that the Congress, through its enactment, did not, and could not under the ninth amendment to the constitution, intend to take away the jurisdiction of the Supreme Court or

---

[38] (Con't.)

important questions are not fully decided by a court of last resort." Keefe Report, p. 248.

The Keefe Report appears in Vol. 2 of this Court's library compendium of legislative history of the Uniform Code. Subsequently, Mr. Pasley was a key staff member of the Morgan Committee (under Professor Edward Morgan) which drafted the code in the Office of the Secretary of Defense.

> of other courts in habeas corpus matters. It was the decision in the Humphrey case that the courts still have jurisdiction, and that the law does not take away the jurisdiction of the courts in habeas corpus proceedings."
>
> "MR. McCARRAN. But the Congress, when it enacts a law, makes the law. The Supreme Court may reverse a decision the next day, or the next week. . ." (96 Cong. Record, *supra*, p. 1414, Feb. 3, 1950)

The authoritative Kefauver distinction is thus predicated on maintaining rather than enlarging the judicially-enforced perimeter of prerogatives for military courts, and all ambiguity in the legislative history becomes clear: The reiterated limiting reference to habeas corpus review was intended solely to skirt the boundaries of a then-recent constitutional decision of this Court, not to break any new ground for Congressional powers, and certainly not to limit the existing powers of the civilian courts.[39]

---

[39] In its Brief, p. 37, fn. 20, the Government applies a surprisingly distorted glass to Mr. Felix Larkin's observation before the House Armed Services Committee that

> "There is still a way to go to the Supreme Court of the United States, actually, and that is by habeas corpus."

Hearings on H.R. 2498, at p. 1277. Actually, the context of Mr. Larkin's remarks dealing with proper nomenclature for the Court of Military Appeals (eliminating the use of the word "Supreme"), makes clear that Mr. Larkin's word "a" should not be read exhaustively. Respondent suggests that great constitutional rights do not so turn on *double entendre*.

Senator Kefauver's reference to re-enactment of the Kem amendment[40] provides further dimension to the traditionalism implicit in the legislative history of Article 76, and makes the history and intent of the (substantially identically worded) predecessor section directly pertinent.

The 1948 revisions of the Articles of War were the first post-war revisions to the Army's military courts-martial system and, indeed, the first revision of the Army procedures since 1920 (Act of June 4, 1920, c.227, Sec. 1,*et seq.*, 41 Stat. 787, *et seq.*). They were enacted to stem public criticism of slipshod, inequitable, and sometimes cruel treatment of military prisoners during World War II and to provide a civilized framework for handling discipline problems in a military establishment of unprecedented size. The background of their enactment indicates that the principal purposes of the 1948 revisions were to regularize and simplify existing procedures and to strengthen the likelihood that the machinery of courts-martial could operate with substantial fairness.[41]

Thus, in its Report dated Dec. 13, 1946, wrote the Advisory Committee on Military Justice to the War Department (The Vanderbilt Committee),[42] whose recommendations

---

[40] See also confirmations of the direct derivation of Article 76 from Article 50(h) in House Armed Services Committee, subcommittee No. 1, *Hearings* on H.R. 2498, 81st Congress, 1st Session (1949), p. 1222; and Senate Armed Services Committee (subcommittee), *Hearings* on S. 857 and H.R. 4080, 81st Congress, 1st Session (1949), p. 119.

[41] The Bill (H.R. 2575, 80th Congress, 2nd Session) was itself entitled "A Bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes," – and staked out no broader field for military courts than that.

[42] The report of the Vanderbilt Committee appears in this Court's Legislative History, Amendments to the Articles of War, *supra*, Vol. 2.

formed the basis for the War Department's proposals enacted in the Elston-Kem Amendments:

> "Specific Recommendations
>
> "A. The Checking of Command Control
>
> "5. The final review of all general court martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by the Judge Advocate General or by the Assistant Judge Advocate. . . This recommendation relates not only to checking command control but also in particular to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.
>
> "In order to make this recommendation effective, Article of War 50½ [the predecessor of Article 50(h)] should be amended. It should be rewritten and procedure prescribed should be clearer and more definite." Vanderbilt Committee Report, pp. 8-9.

In his letter of transmittal to the House Committee on the Armed Services, Secretary of War Robert P. Patterson on March 12, 1947, wrote:

> "Section 26. . .amends the present provisions of Article 50½ to make explicit the finality of sentences of court martial." H.R. Rep. No. 1034, 80th Congress, 1st Session, p. 12 (1947).

And Brigadier General Hubert D. Hoover, Assistant Judge Advocate General of the Army, testified that

> "The principle [of finality] is well established at present but the amendment is somewhat more definite than the present article." House Armed Services Committee, Subcommittee No. 11 (legal), 80th Cong. 1st Session (1947), *Hearings* on H.R. 2575 (1947), p. 1118.

Even as the scope of the 1948 amendment was thus to make existing provisions more explicit and more definite[43] – and again, not to break new ground in relation to civil jurisdiction – the direct purpose within the military establishment of the newly-honed "finality" provision was succinctly stated in the Report of Mr. Elston, the Chairman of Subcommittee No. 11, and the House sponsor of the bill –

---

[43] It is clear from authoritative contemporaneous administrative interpretation of Article 50(h) of the Articles of War that the principle of finality therein made explicit had a narrow and limited interpretation. In 41 Ops. Att'y Gen. 49, Dec. 29, 1949, Attorney General J. Howard McGrath advised the Secretary of the Army that the terse finality provision of Article of War 50(h), as amended by section 226 of the Selective Service Act of 1948, could not bar pre-existing procedures for administrative clemency in the correction of military and naval records post court-martial pursuant to Section 207 of the Legislative Reorganization Act of 1946. (Then 5 U.S.C. §191a, 275; now 10 U.S.C. §1552). The Attorney General's opinion was based on the "cardinal principle of construction that repeals by implication are not favored" *United States v. Borden Co.*, 308 U. S. 188, 198 (1939) and the absence of any evidence "[that] indicates that congress had any intention thus to supersede sections 131 and 207 of the Legislative Reorganization Act." 41 Ops. Att'y Gen. at 53. As an authoritative administrative interpretation, the Attorney General's careful finding of a limited scope for "finality" must be given great weight. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294 at 315 (1933); *Edward's Lessee v. Darby*, 25 U. S. (12 Wheat.) 206 (1827). And where a statute (Article 50(h)) is reenacted, having received a contemporaneous and practical interpretation, such interpretation must be given even greater weight. *United States v. Anderson*, 269 U. S. 422, 439 (1926), *Brewster v. Gage*, 280 U. S. 327, 337 (1930). With respect to Attorney General McGrath's opinion, it was found "noteworthy. . . that as a matter of administrative recognition this 'finality' provision has not been read with dictionary literalness" in Mr. Justice Frankfurter's additional opinion - in *Burns v. Wilson*, *supra*, 346 U. S. at 850 fn. 2, cf. *Gusik v. Schilder*, 340 U. S. 128 (1950).

> "The section [section 76] makes explicit the finality of sentences of court martial, and for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism." Report by Mr. Elston to House Armed Services Committee, July 8, 1947, at page 4163 of House Armed Services Committee (full committee), 80th Cong., 1st Sess., *Hearings* on H.R. 7741 and H.R. 2575.

The principle of finality, as thus expressed in both the 1948 amendments to the Articles of War and the Uniform Code of Military Justice, merely strengthened the mechanisms of review within the traditional ambit of jurisdiction of the military courts, and in no way displaced the traditional, pre-existing scope of the jurisdiction of the Court of Claims[44] to pass on constitutional error.

---

[44] The statutory source of Court of Claims jurisdiction in *Augenblick*, 28 U.S.C. § 1491, has experienced but one significant change in wording – wholly irrelevant here – in the 81 years since the enactment of the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505). Significantly, all of Section 1491, containing as it did theretofore "jurisdiction to render judgment upon any claim against the United States: (1) Founded on the Constitution," was reenacted into law on June 25, 1948 – *the day following the enactment that created Article of War 50(h)*, without a word of reference to any termination of jurisdiction with respect to courts-martial reviews, either in the enactment (P.L. 773, 80th Congress) or in any pertinent source of legislative history. See discussions of Section 1491 in House Committee on Revision of the Laws, *Revision of the Federal Judicial Code, with Revision Notes* (Preliminary Draft) (1945), pp. 287-8; House Committee on Revision of the Laws, Revision of Title 28, United States Code (H.R. Rep. No. 2646), 79th Cong., 2d Sess. (1946), p. 133); and House Committee on Revision of the Laws, Revision of Title 28, United States Code (H.R. Rep. No. 308) 80th Cong., 1st Sess. p. A138 (1947). See also 96 Cong. Rec., 7927, 8540, especially remarks of Mr. Donnell at 7928.

(Cont'd.)

2. This Court has authoritatively determined that the concept of finality as used in Article 76 of the Uniform Code of Military Justice does not and cannot oust the civil courts from appropriate jurisdiction. *Gusik v. Schilder*, 340 U.S. 128 (1950) (opinion by Douglas, J.). More particularly the reach of "finality" extends only to establish the period of termination for proceedings within the military system and their consequent ripeness for appropriate collateral attack.

The *Gusik* case involved a petition for habeas corpus by a military prisoner, whose petition was challenged, successfully, by the Government on the grounds that he had not exhausted his rights to petition for a new trial

---

[44] (Con't.)

On the other hand, Congress has also seen fit to make an exclusion of jurisdiction explicit, where such was its intention. On the next and second occasion since June 24, 1948 (when Article of War 50(h) was enacted) when the scope of jurisdiction of the Court of Claims came before the Congress, P.L. 158 of the 83rd Congress in 1953, *inter alia*, reenacted Section 1491 with a specifically limiting amendment — to remove from the court's jurisdiction claims against, or founded upon actions of the *Tennessee Valley Authority*. But in so doing the legislative intention was made very clear that no other changes were being made in the jurisdiction of the court. (H.R. Rep. No. 695, 83rd Cong., 1st Sess., p. 6 (1953)).

These actions establish a statutory scheme which sets the jurisdictional limits of the Court of Claims in deliberate and explicit language in the court's own jurisdictional section (Title 28, U.S. Code). This is indeed far removed from extinction of a substantial (and traditional) jurisdiction of the Court of Claims by implication drawn from a statute concerned with a wholly different subject matter, without review by the Judiciary Committees responsible for Court of Claims matters.

under the then-applicable provisions of Article 53[45] of the Articles of War (the predecessor to Article 73 of the Uniform Code). In declining to reach the merits of the petitioner's contention (while ordering that the Court of Appeals for the Sixth Circuit retain jurisdiction pending the outcome of a petition for a new military trial), this Court said:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition of habeas corpus on the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. That is not only the holding of the Court in a long line of cases (see *Mooney v. Holohan*, 294 U.S. 103, 115; *Ex parte Hawk*, 321 U.S. 114, 116); it is the rule which Congress recently wrote into the Judicial Code. 28 U.S.C. § 2254. *The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts.* If an available procedure has not been employed to rectify the alleged error which the federal court is asked

---

[45] The text of Article 53, Act of June 24, 1948, c. 625, § 230, 62 Stat. 639, is set forth in the Statutory Appendix hereto, p. 94.

The Government's brief in *Gusik* served to leave no doubt that finality provisions of three sections – Articles 50(h) and 53 of the Articles of War, and the then recently passed Article 76 of the Uniform Code – have identical meaning within a harmonious military procedure, which was unaffected by the enactment of the Uniform Code of Military Justice (see *supra*, pp. 56-63). See Brief for Respondent in *Gusik v. Schilder*, October Term 1950, No. 110, pp. 12-18.

to correct, any interference by the federal court may be wholly needless." 340 U.S. at 131-2. (emphasis added)

Thus Justice Douglas, in full accord with the position urged by the Government in *Gusik*,[46] summed up the manifest purpose of the finality language –

"We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system."[47] 340 U.S. at 132.

---

[46] With compelling emphasis on the same point in the companion case of *Whelchel v. McDonald*, 340 U.S. 122 (1950), the Government there asserted flatly that "the civil courts are in no wise deprived of their jurisdiction" by the finality provisions of Article 53. Brief for the Respondent, No. 109, October Term, 1950.

[47] This Court also upheld thereby the determination of the Circuit Court for the Sixth Circuit in *Gusik* that –

". . . it would seem that all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision collaterally." 180 F.2d 662, 665.

The Supreme Court's holding in *Gusik*, quoted above in the text, was in response to the petitioner's contention that the finality language precluded habeas corpus review, and hence was unconstitutional. The Court dismissed that contention by construing finality language narrowly, thus avoiding the constitutional question, in holding that a Congressional attempt to preclude habeas corpus review would have been such a marked break with history that "the purpose would have been made plain and unmistakable." 340 U.S. at 133. See and compare pages 56-63, *supra*, to which the same logic of construction would apply with respect to the necessity to make plain any intent to preclude Court of Claims review.

While the precise issue before the Court in *Gusik* was limited to whether or not the writ of habeas corpus for court-martialed prisoners involved finality language, note that Justice Douglas, in the judicial language quoted above articulating the purpose of finality,

Hence the notion of "finality", applied identically in Article 76 and the predecessor Articles of War, cannot in any way limit review for constitutional error in federal *civil* courts, and merely defines a terminal state in *military* proceedings when a case is ripe for such collateral attack as may appropriately lie.

B. If There Be Doubt That Article 76 of the Uniform Code Perpetuates Court of Claims Review of Constitutional Questions Arising in Military Proceedings, Such Doubt Should Be Resolved in Favor of Continuing the Traditional Jurisdiction of That Civil Court, Since a Contrary Holding Would Render Article 76 Unconstitutional.

Long ago, Mr. Justice Story's dissent in *Cary v. Curtis*, 44 U.S. (3 How.) 236, 252 (1845) laid the foundation for construction of ambiguous statutes so as to avoid holdings of unconstitutionality. Based upon his view that Congress could not constitutionally remove a citizen's right to sue a customs collector for illegally-collected duties, Justice Story's reasoning sets a clear path for decision in this case, and merits full quotation:

> "The Constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my brethren does, in effect, vest such interpretation exclusively in that officer [the Secretary of the Treasury].

---

47 (Con't.)
was careful to broaden that principle beyond habeas corpus alone to "collateral attack of military judgments" in general, 340 U.S. at 131, which broad principle he subsequently buttressed by an illustrative listing of cases expressing traditional forms of collateral attack on court-martial judgments, trespass, replevin, assault, battery and false imprisonment, as well as habeas corpus, 340 U.S. at 133, fn. 3.

> "These considerations have led me to the conclusion that it never could be the intention of Congress to pass any statute, by which the courts of the United States . . . should be excluded from all judicial power, in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them – a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and *a fortiori* to adopt that which would be in general harmony with our whole system of government." 441 U.S. (3 How.) at 257.

At issue in *Cary* was a private individual's right to present his claim to a constitutional court – the same issue raised here by the Government in challenging Commander Augenblick's right to test judicially the deprivation and stigma of his constitutionally deficient court-martial. In this light Commander Augenblick's sole remedy against high-handed unconstitutional action hinges on the questions of whether Congress excluded, and could have excluded, "the courts from all judicial power."

If any doubt exists as to Congressional intent in enacting the finality language of Article 76, Respondent submits that such doubt should be resolved permissively. To hold to the contrary would place this Court in the position of either sanctioning an unconstitutional usurpation of judicial power, or striking down as unconstitutional the carefully tailored and generally salutary structure of the Uniform Code of Military Justice.

1. This Court has long affirmed, by exercise of familiar and well-grounded statutory construction (and, less frequently, by direct articulation of constitutional principles – see *infra*, pp. 72-75), the right of

> "an individual whose interest is acutely and immediately affected by an administrative action presumptively . . . to secure at some point a judicial determination of its validity." Jaffee, *Judicial Control of Administrative Action* (1965), p. 336.

Such presumption of reviewability, Professor Jaffee says, plays a "decisive" role in "cases of statutory ambiguity or silence, and in new situations in which there are factors pro and con." *Ibid.*, p. 336. The same point is made, more guardedly, by Professor Davis, as follows:

> "The decisions of the past two or three decades fit reasonably well the idea of a presumption of reviewability that may be rebutted by affirmative indication of legislative intent in favor of unreviewability, or by some special reason for unreviewability growing out of the subject matter or the circumstances." 4 Davis *Administrative Law Treatise*, § 28.07, p. 31 (1958).

As pointed out above, the legislative history of Article 76, as expressed in Congressional documents and as found by this Court (*Gusik v. Schilder*, 340 U.S. 128 (1950), see *supra*, pp. 55-67), certainly omits any "affirmative indication of legislative intent in favor of unreviewability." Moreover, judges of both this Court[48] and of the Court

---

[48] Thus Justice Douglas states the rationale for limited civil review (on habeas corpus) where military reviewing agencies have not complied with due process requirements:

> "In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision

(Con't.)

of Military Appeals[49] have sharply and persuasively articulated an affirmative need for civil court collateral review of military tribunals, as opposed to "some special reason for unreviewability."

Indeed, even in those cases where this Court has determined that Congress unmistakably intended to curb jurisdiction of civil courts, the Court has labored diligently and imaginatively to find avenues in which essential constitutional rights can secure judicial protection. *Monongahela Bridge Co. v. United States*, 216 U.S. 177 (1910). Thus in the *Cary* case the majority holding which so

---

[48] (Con't.)

except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate." *Burns v. Wilson*, 346 U.S. 137, at 154 (Dissenting Opinion).

[49] And Judge Kilday makes his own moving plea to his fellow judges of the Court of Military Appeals in *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), as follows:

"To summarize, I can but again reiterate my certainty that this Court is bound by the Supreme Court on questions of constitutional import; that our actions in this area are reviewable by civil tribunals; that any other view adopted by us raises the specter of possible harm to an accused with no lasting benefit to the Government; and that finality of litigation occurs only if we face every such issue squarely." 16 U.S.C.M.A. at 643.

Judge Kilday cites as instances of casual handling in the military courts, where constitutional review by civil courts has been necessary to keep the CMA "on its toes" and protect the rights of military defendants, *Gallagher v. Quinn*, 363 F.2d 301 (C.A. D.C. 1966), *cert. denied*, 385 U.S. 881 (1966), *Ashe v. McNamara*, 355 F.2d 277 (C.A. 1, 1965), *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F.Supp. 205 (1947), and *Shaw v. United States*, 174 Ct. Cl. 899, 357 F.2d 949 (1966).

shocked Mr. Justice Story was premised explicitly on the availability of other judicial avenues to test the lawfulness of customs assessments, 44 U.S. (3 How.) 236 at 252. See also *Philips v. Commissioner*, 283 U.S. 589, 595 (1931). Similarly, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), where a legislative withdrawal of Supreme Court habeas corpus review over the Reconstruction Acts was recognized, the avenue of original Supreme Court habeas corpus jurisdiction to hear such actions was nonetheless left open, there by implication and subsequently explicitly in *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). Similarly, too, denial of a draft register's remedy to test his induction in *Falbo v. United States*, 320 U.S. 549 (1944), was confined to a simple requirement for exhaustion of administrative remedies prior to the subsequent raising of the defense of unlawfulness in a criminal judicial trial. *Estep v. United States*, 327 U.S. 114 (1946). And in *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, 321 U.S. 414 (1944), this Court upheld the power of Congress to provide an exclusive avenue to test lawfulness under the Emergency Price Control Act of 1942, but an avenue whose constitutionality was premised, at least in part, on the availability of *certiorari* review by *this* Court of the Emergency Court's determination.

In all of the foregoing cases, this Court has sanctioned curbs on the judicial power of federal civil courts only when avenues to raise constitutional questions in Article III courts – and specifically this Court – remained open to protect constitutional rights.[50] See Hart, "Further

---

[50] As a corollary, perhaps, this Court has held that the Judicial power of the United States must be plenary –

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both

(Cont'd.)

Note on the Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic" in Hart and Wechsler, *Federal Courts and the Federal System* (1953) pp. 312-340. In this case Commander Augenblick has taken the *only* available road to the civil courts and, specifically, to this Court. To construe Article 76 of the U.C.M.J. to permit such collateral review would hence be, in Mr. Justice Story's words,

> "to adopt that which would be in general harmony with our whole system of government,"

while to adopt a contrary view would be to vest in the military

> "a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties." 44 U.S. (3 How.) at 257.

In such a situation, a continuing power of civil review must be presumed. See also *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958), and *Gusik v. Schilder*, 340 U.S. 128, 132-3 (1950).

2. Respondent submits that it would be unconstitutional for Congress to bar access to civil courts to test

---

[50] (Con't.)

of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22 (1932) at 60.

Applied to the instant case, *Crowell* dictates that a civil court reviewing Commander Augenblick's constitutional claim has sufficient scope in reviewing the record pertinent to that claim to discharge its constitutional function. The constitutionally required scope of review for constitutional claims was recently questioned by a Congressional proposal to curb federal court review of the voluntariness of confessions in Title II of the Omnibus Crime Control and Safe Streets Act of 1968, which provision failed of final passage.

constitutional error by military defendants for whom the remedy of habeas corpus is not available by virtue of the accident of punishment. That conclusion follows from two clear principles: first, that soldiers as well as civilians are guaranteed due process of law by the Fifth Amendment, and second, that the judicial power of the United States, confirmed by Article III of the Constitution, extends to the protection of military personnel and cannot be abrogated.

Notwithstanding the power of the Congress, set forth in Article I, § 8, cl. 14 of the Constitution, "To make Rules for the Government and Regulation of the land and naval forces," it is clear that the due process protection of the Fifth Amendment is not subject to any exception with regard to soldiers – either by virtue of Congressional powers under Article I or the military exception (limited to the requirement for grand juries) set forth in the Fifth Amendment. This Court states this assurance flatly in *Burns v. Wilson*, 346 U.S. 137 at 142-43 – in the portion of the opinion quoted at p. 4, *supra*. Compare *Wade v. Hunter*, 336 U.S. 684, 690 (1949).

Moreover, under Article III, the judicial power of the civil courts, of which the Court of Claims is manifestly one by judicial interpretation and legislative action,[51] extends to all "Cases and Controversies arising under the

---

[51] Both the Congress and the Supreme Court have left no doubt that the Court of Claims is an Article III Court in the fullest sense, subject to such limitations of its jurisdiction as the Congress may appropriately impose. Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U.S.C. § 171. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). Note, on the other hand, that no quantity of encomiums can change the "ad hoc" nature of court-martial courts (as characterized by Mr. Justice Frankfurter in his Opinion on Rehearing in *Burns v. Wilson*, 346 U.S. 844 at 851) or assimilate the Court of Military Appeals to the Constitutional status of Article III courts.

Constitution . . .", embracing, by its terms, protection of the rights of the military. The reach of Article III protection – the right to an opportunity for hearing by a judicial court of a claim of constitutional error – was expansively stated by Justice Brandeis (joined by Justices Stone and Cardozo) in his concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), at 84:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law applied; and *whether the proceeding in which facts were adjudicated was conducted regularly.* To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."[52] (Emphasis added)

And Mr. Justice Jackson similarly assumed judicial review in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), referring to the

---

[52] Justice Brandeis' words are admittedly dictum in the context of an opinion which dwelt on the scope of a court's powers to review, rather than its rights to do so. Nonetheless, this Court's holding in *St. Joseph*, as expressed in Chief Justice Hughes' opinion for the Court, clearly embraced the judiciary's power to interpret constitutional authority of both legislative and administrative organs. At 52 the Court said:

> "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

And the Court specifically also held, in terms every bit applicable here, that its power of review includes the power to ascertain whether "the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing . . ." 298 U.S. at 51.

power of the President to execute the law and to the Fifth Amendment:

> "One gives a Governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a Government of laws, not of men, and we subject ourselves to rulers, only if under rules." 343 U.S. at 646.

The assumption of a constitutional judicial power of review is also explicit in this Court's holding in *Crowell v. Benson*, 285 U.S. 22 (1932), justifying the grant of adjudicatory powers to administer to agencies, for the purpose of relieving "the courts of a most serious burden *while preserving their complete authority to insure the proper application of the law.*" 285 U.S. at 34 (emphasis added).

Although the precise issue in this case has never been tested in this Court, the right of individuals to seek recourse to a judicial court in cases and controversies as to claims of infringement of individual rights has been affirmed under Article III. *Stark v. Wickard*, 321 U.S. 288 at 310 (1944). See also *Estep v. United States*, 327 U.S. 114, 127, 132-33 (1946) (concurring opinions of Justices Murphy and Rutledge). Moreover, the right to a judicial test of action that deprives one "of all that makes life worth living," has been affirmed under the Fifth Amendment. *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) and cases cited.

Here both constitutional tenets, of judicial power and individual right to due process, reinforce each other in compelling the conclusion that the total deprivation of collateral civil review, which would flow from a literal reading of the finality provision of Article 76, would be contrary to the deepest principles of the Constitution.

III. THE COURT OF CLAIMS DECISION IN AUGENBLICK LIES WELL WITHIN THE SCOPE OF COLLATERAL REVIEW OF MILITARY CONVICTIONS APPROPRIATE FOR THAT COURT.

For over 80 years the Court of Claims has assumed jurisdiction in actions brought by servicemen seeking back pay following invalid courts-martial. During this period the Supreme Court remained the ultimate guarantor of the constitutional rights to servicemen, acting in review of the determinations of the Court of Claims where military justice had gone awry. Now the Government would abolish all that, contending that the Court of Claims exceeded its jurisdiction in these cases. But *Augenblick* stands on solid statutory grounds, and represents an exercise of jurisdiction by the Court of Claims which is both traditional and wholly salutary.

A. In Ascertaining Constitutional Error in *Augenblick*, the Court of Claims was Wholly Within its Powers and Duties as a Civilian Constitutional Court.

1. *The Court of Claims heard and decided the Augenblick case in strict conformity with its statutory and constitutional powers.* The Tucker Act, § 1, 24 Stat. 505 (1887), now 28 U.S.C. § 1491 authorizes the Court to adjudicate

> "any claim against the United States founded either upon the Constitution, on any act of Congress, on any regulation of an executive department. . ."

Pursuant to that authority, the court has here adjudicated Commander Augenblick's money claim arising from what the Court of Claims determined to be his constitutionally invalid conviction and dismissal from the Navy. The Court's jurisdiction was validly invoked by the filing of a suit for active duty pay under the Act of Congress providing compensation for military personnel. 63 Stat. 804-9 (1949), 37 U.S.C. §§ 231-4 (1958). Thereupon, its jurisdiction attached, *Bell v. Hood*, 327 U.S. 678 (1946), requiring the determination of whether Commander Augenblick had active duty status. No statute bars the making of that determination. *Osborn v. Bank of the United*

States, 22 U.S. (9 Wheat.) 738 (1824), which is therefore mandatory. As an authoritative commentary has noted

> "To make it, the Court must decide whether the discharge issued plaintiff was a nullity. If the Court holds for the plaintiff it does not 'restore' him to active duty, nor 'confer' a particular status. Active duty status had already been conferred on plaintiff by official action prior to the discharge. The Court simply holds that it never terminated because of legal inefficacy of the separation action. Accordingly, he has a legal right to the pay incident to that status. As the [Supreme Court] said in one of its earliest decisions invalidating a separation, the plaintiff, not having been discharged lawfully, 'is still in office and is entitled to the pay attached to the same.' [citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)]."

Meador, *Judicial Determinations of Military Status*, 72 Yale L. J. 1293, 1300 (1963). Compare, *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

Regular as was the exercise of the Court of Claims's jurisdiction in *Augenblick*, that court's own holding in *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967), (per Judge Davis) is no rebuttal whatsoever, as the Government would have this Court believe (Gov. Br. 34, fn. 17) in asserting that *Eastport* holds that the provision of law on which the claimant relies must —

> "affirmatively confer . . . the right to a certain sum (typically, in a claim founded upon the Constitution), the right to 'just compensation' for property taken by the Government."

The purportedly exclusive proposition finds no warrant in *Eastport*. Note the full context to the Government's citation 372 F.2d at 1008, in which the Court of Claims makes clear that it and this Court in review, have long sanctioned the entertaining of suits for back pay based on implied as well as explicit statutory or constitutional requirements. See also *United States v. Brown*, 206 U.S. 240 (1907), and other cases cited at fn. 34, p. 54 *supra*.

2. *In hearing and determining Commander Augenblick's claim, the Court of Claims undertook collateral review of a claim of constitutional error going to the "jurisdiction" of the military proceedings, as that expanded concept is now understood in the Federal judicial system.*

Johnston v. Zerbst, 304 U.S. 458 (1938) is the landmark decision by the Supreme Court which extended the scope of collateral review in federal courts to invasion of constitutional rights. That case concerned a collateral attack upon a conviction in a United States District Court founded on a denial of due process to the Defendant.[53] *Johnston v. Zerbst* stands for the proposition that constitutional review is available before the Federal Courts and ultimately before the Supreme Court for the Defendant tried without due process of law. The significance of *Johnston v. Zerbst* in the instant case is that the Government argues that constitutional review may be available for all other citizens, in collateral attack of state or federal convictions, but not available to servicemen.

There is little specific precedent in this Court to look to in order to determine whether this gaping exception is to be excised from a constitutional remedy given all other Americans.[54] But there is an orderly progression in the evolution of military justice that went on during and after World War II that points clearly to the extension of constitutional remedies rather than their extinction. And this progression, not coincidentally, began shortly after this

---

[53] The Government continuously and erroneously characterizes the holding in *Johnston v. Zerbst* as pertaining to review of state criminal convictions by federal *habeas corpus*. See, e.g. Gov. Br. 51. Such review did follow closely after *Johnston v. Zerbst* and *Moore v. Dempsey*, 261 U.S. 86 (1923) and was the basis for Supreme Court's action in the line of cases including *Napue, Alcorta*, etc., cited in Argument IB, *supra*.

[54] Nonetheless, Mr. Justice Frankfurter in his separate opinion on rehearing in *Burns v. Wilson*, 346 U.S. 844, 846 noted that the expanded scope of review of jurisdiction on *habeas corpus* (Cont'd.)

Court had acted so effectively in *Johnston v. Zerbst* and *Moore v. Dempsey*. This progression is marked by two major decisions, *Burns v. Wilson, infra* pp. 82-86 in this Court and *Shapiro v. United States* in the Court of Claims. Indeed, the authority cited by the Government in its brief in an effort to rebut the appropriateness of modern concept of jurisdiction cannot persuasively rebut its applicability,[55] (Gov't. Br., pp. 51-3), and actually supports its application to a proper case of constitutional abuse.

The *Shapiro* case was indeed a "truly exceptional case,"[56] which characterization amply fits this case as well. The trial

---

(Cont'd.)

> "has been neither questioned nor limited in any instance involving collateral attack, by way of *habeas corpus*, on judgments of conviction entered by a Civil Court."

Justice Frankfurter acknowledging that *Johnston v. Zerbst* had never been considered by the Supreme Court in the context of military *habeas corpus* cases, posits its scope of inquiry as equally appropriate to the military and cites the Court of Claims' role as a valid exemplar thereof. *Ibid.* at 847. See also his opinion in chief in *Burns*, 346 U.S. at 49. Proceeding upon Mr. Justice Frankfurter's analysis, the Court of Claims merely exercised that power in *Augenblick*, concluding that

> "There is no adequate reason for looking to *habeas corpus* alone, or for thinking that Congress limited its exception from finality to that specific proceeding." 377 F.2d at 592. (A-317)

[55] To argue as the Government does (Gov't. Br. 49-54), that Congress had *any* intent with regard to the scope of *civil* court jurisdiction in enacting the U.C.M.J. strains credibility. The "existing" procedures then re-enacted (See *supra*, p. 61) were obviously military not civil.

[56] However the constitutional injustices in *Shapiro* were by no means wholly unknown in its own day, or left unscrutinized in civil courts. See *United States ex rel Innes v. Hiatt*, 141 F.2d 664 (C.A. 3, 1944), *Hicks v. Hiatt*, 64 F. Supp. 238 (D.C. Pa. 1946), *Smith v. Hiatt*, 170 F.2d 61 (C.A. 3, 1948), and *Anthony v. Hunter*, 71 F. Supp. 823 (D.C. Kan., 1947).

was viewed by the Court of Claims in an "empty charade". It must be presumed that Congress was fully aware of *Shapiro* in 1950. It would consequently be logical that, had Congress intended to modify Shapiro's jurisdictional impact, it would have done so explicitly in enacting the UCMJ. Unchallenged, *Shapiro* remains a valid precedent for the concept of jurisdiction prevelant in the Code. It was decided squarely in the light of *Johnston v. Zerbst*, and represents a firm determination that the convictions of drumhead courts martial may be scrutinized in civilian courts for constitutional error.

Moreover, the case *Hiatt v. Brown*, 339 U. S. 103 (1950), does not resurrect the traditional, archaic pre-*Johnston v. Zerbst* jurisdictional scheme. The Supreme Court's holding in *Hiatt* was quite specific in stating that adherence to due process was properly before the civilian court. The Court then determined that the errors before it did not raise due process questions.[57] The Court said:

> "We think the [Court of Appeals] was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel." 330 U. S. at 103.

The Court then cited, by comparison, *Humphrey v. Smith*, 336 U. S. 695 (1949) — a case which was clearly in contemplation of the framers of the U.C.M.J. (see p. 58, *supra*) which decided that pre-trial investigation was not a

---

[57] Similarly, none of the errors alleged in *Goldstein v. Johnson*, 184 F.2d 342 (C.A.D.C., 1950) *cert. denied*, 340 U. S. 879 (1950), appear to rise to constitutional proportions.

jurisdictional requirement; by any fair reading, *Humphrey* appears premised on the availability of constitutional inquiry in an appropriate case.[58] See also the companion case, *Wade v. Hunter*, 336 U. S. 684 (1949), and *Whelchel v. McDonald*, 340 U. S. 142 (1950), where this Court plainly stated that it would inquire to determine whether the military defendant had been afforded an insanity hearing because:

> "we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point in time an opportunity to tender the issue of insanity." 340 U. S. at

This is hardly an inquiry into the traditional, pre-*Johnston*, pre-*Moore*, pre-*Shapiro*, pre-*Hiatt*, 19th Century, "jurisdiction" of the trial court. It was within this clearly established jurisdictional framework that the Court of Claims engaged, in *Augenblick*, in limited review of the defendant's claim that constitutional due process had been denied him.

3. In exercising its jurisdiction to review for Constitutional error, the Court of Claims conducted precisely the inquiry sanctioned by this Court in Burns v. Wilson, 346 U. S. 137 (1953).

---

[58] Thus, this Court in *Humphrey* said:

> "It is contended that the court-martial was without jurisdiction. If so the court-martial exceeded its lawful authority and its jugment can be invalidated despite the limited powers of a court in *habeas corpus* proceedings. *The soundness of this contention depends upon an interpretation of the 70th Article of War. . .*" 336 U. S. at 696 (emphasis added).

On the basis that Article 70 was *not* intended to be jurisdictional, this Court determined that

> "a trial *fairly conducted* cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War." 336 U. S. at 701. (emphasis supplied.)

Wholly to the contrary of the Government's contentions with respect to the scope of inquiry on collateral attack, this Court's holding in *Burns v. Wilson*, 346 U. S. 137, requires the *affirmance* of the Court of Claims opinion in *Augenblick*. The Government cites *Burns* for its proposition that:

> "It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." Gov. Br. p. 55, citing 346 U. S. at 144.

Applying that standard to *Augenblick*, it is vividly apparent that the military has not given fair consideration to *Augenblick's* claims of constitutional deprivation. The reasoning of the Court in *Burns* amply distinguishes the result in that case from this and embraces *Augenblick* squarely within its protections.

Burns v. Wilson has been cited for many propositions. The one undeniable element in the thinking of all nine justices was that the serviceman was entitled to a guarantee of a fair court-martial. Justice Minton, writing for the four-man majority, stated:

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military Courts as well as civil Courts." (346 U. S. at 142-3).

At issue in *Burns* was whether the military reviewing courts had fully and fairly "scrutinized the trial records before rejecting petitioner's contentions". 346 U. S. at 144. This Court satisfied itself that the military reviewing authorities had, in "lengthy opinions, . . . concluded that

petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed". Foremost among the military examinations persuasive to this Court was that the military authorities had ascertained

> "that the trials proceeded in an orderly fashion—with that calm degree of dispassion essential to a fair hearing on the question of guilt; [and] *that there was exhaustive inquiry into the background of the confessions—with the taking of testimony from the persons most concerned with the making of these statements. . .*" 346 U. S. at 137 (emphasis added).

Having so satisfied itself, upon full examination of the military proceedings (and confirming the conclusions of the Court of Appeals below, which had in itself, erroneously, engaged in "reweighing each element of the relevant evidence in the trial record," 346 U. S. at 146), this Court determined that—

> "Petitioners have failed to show that this military review was legally *inadequate* to resolve the claims which they have urged upon the civil courts," (emphasis added).

and the Court went on to hold that an opportunity in a *habeas corpus* hearing *to make a new record* was therefore precluded:

Here, the petitioner has asked the Court of Claims to do no more than the Supreme Court did in *Burns* and there held was the proper exercise of collateral review—to examine the *fairness* and *adequacy* of the military reviews, on the basis of the military record, for the purpose of determining whether the petitioner has "been accorded a complete opportunity to establish the authenticity of [his] allegations,"[59] and whether the military procedures fixed

---

[59] Mr. Justice Douglas in his dissent (wherein he differed with the majority in appraising the merits, rather than the rule of decision), (Con'd.)

guilt "by dispensing with rudimentary fairness rather than finding truth." Respondent simply cannot find, in any of the majority's utterances in *Burns*, any wholesale curtailment of constitutional review of military convictions by civilian courts under circumstances where this same review of state courts (consistent with *Johnston v. Zerbst*) would be unquestioned.

The Government has seized on language qualifying the principles quoted above to impute an unduly constricted view of the civil judiciary's role under *Burns*.[60] If, indeed, the test for a civilian court is whether "fair consideration" has been given the military defendants' claims within the military courts, this "fair consideration" test must be defined in terms of the limitation which the *Burns* majority actually put on the reviewing civilian courts. This limitation was pointedly against the reviewing of "each item of evidence" raised as constitutional error in the court-martial. But this reasonable stricture in no way inhibits the Court of Claims (or this Court) from the form of review exercised in *Augenblick*. There was no airing of any dispute of fact,

---

[59] (Con't.)
states the affirmative rule in *Burns*:

> "If the military agency has fearlessly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a Federal court would not advance the cause of justice, but where the military review agency has not done that, a Court should entertain a petition for *habeas corpus*," 346 at 154.

In *Augenblick*, the "military agency" has not measured up to standards of *Burns*.

[60] Accordingly, it is not the duty of the civil courts simply to repeat that process—to reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. 346 U. S. at 144.

no resifting of evidence required in order for the Court of Claims to determine that the Board of Review and the Court of Military Appeals had erroneously placed the burden on the *defendant* of demonstrating the Government's bad faith when not complying with the Jencks mandates. Nor was any review of evidence required in order to find error of law in the refusal of the law officer (and his affirmance by military appellate tribunals) to conduct an *in camera* examination of the Mendelson interview notes when the Jencks Act makes such an examination mandatory. A similar error of *law* occurred when the Mendelson notes were not incorporated into the record, precluding all review of what had occurred at trial. Finally, the reliance of the law officer on what had transpired at show-cause, pre-trial proceedings, rather than requiring testimony from Mendelson *at trial*, was a pure error of law requiring no sifting of evidence or reviewing of accumulated facts.

Thus, if the decision in *Burns v. Wilson* is examined for what the Court actually did review, and what caveats of constitutional principle are expressed within its holding, the *Augenblick* determination by the Court of Claims stands entirely within the *Burns* scope of collateral review of military convictions.[61]

The Court of Claims has dispassionately found that military proceedings did not offer an opportunity for "exhaustive inquiry" into a vitally important defense, and that the erroneous consideration of the Jencks issues was "legally

---

[61] Thus, other cases will have to test the scope of constitutional review in the civilian courts where this review requires reevaluation of evidence adduced at the court-martial—or where the error was specifically, but erroneously, ruled on by the Court of Military Appeals. Neither of these elements is present in *Augenblick*.

inadequate."[62] The probity of these conclusions is undeniable, and under *Burns*, the Court of Claims' holding in *Augenblick* should therefore be affirmed.

4. *The decision of the Court of Claims in Augenblick is by no means a novel excursion in the jurisprudence of that Court; nor is its decision in invalidating a court-martial sentence likely to prove an unhealthy burden on the military.*

As indicated *supra*, awards of pay by the Court of Claims have a long tradition, extending far back into the 19th Century. The *Shapiro* case in 1947, and a line of cases subsequent to the enactment of the Uniform Code have given modern life to the court's long tradition of collateral review. That the cases here (and *Shaw v. United States*, 174 Ct. Cl. 899, 357 F.2d 949 (1966)) are the first post-code cases in which relief has been granted is no indication that *Augenblick* is a judicial aberration, nor evidence that the Court of Claims review is needless or undesirable, but obvious evidence of the judicial restraint traditionally exercised by the Court of Claims.[63] *Augenblick* is a case

---

[62] Compare *Begalke v. United States*, 148 Ct. Cl. 397, 286 F.2d 606, *cert. denied*, 364 U. S. 865 (1960), where the Court of Claims said:

> "We find no basis in the record that plaintiff was not accorded a full and fair hearing on the court-martial on his objections now presented. In such a situation we do not re-examine the conclusion of the court-martial." 286 F.2d at 610 (per Reed, J.).

[63] In each of the following cases, the Court of Claims engaged in full-scale examination of the military record to determine whether or not the Defendant's constitutional rights had been observed: *Krivoski v. United States* (denial of counsel), 136 Ct. Cl. 451, 145 F. Supp. 239, *cert. denied*, 352 U. S. 954 (1956); *Graham v. United States* (admission into the court-martial of testimony taken at a Court of Inquiry), 136 Ct. Cl. 324 (1956) *cert. denied*, 353 U. S. 917 (1957); *Griffiths v. United States*, 145 Ct. Cl. 669, 172 F. Supp.

(Con't.)

where the traditional role of the Court of Claims, in full conformity with its statutory and constitutional duties, has been dispassionately exercised to give full contemporary meaning to the guarantees of the constitution to due process in military proceedings.

Much is said by the Government in its briefs, alleging that an affirmance in *Augenblick* would wreak havoc in the enforcement of military discipline. On conceptual grounds, Judge Kilday's opinion in the Court of Military Appeals in *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), *supra*, p.70fn. 49, should assuage such anxieties. But the practical considerations of the military's readiness to accept civil review are equally strong rebuttals. See Meador, *Judicial Determinations of Military Status, supra*, 72 Yale L.J., at 1304-1311.[64] On balance, fairness would be served; confidence in military justice immensely enhanced; and the morale of the soldier the ultimate beneficiary; and these are eminently practical considerations.

Throughout this cause, the Respondent has argued that, absent limited powers of collateral review in the Court of

---

[63] (Con't.)
691; *cert. denied*, 361 U. S. 865 (1959); *Begalke v. United States* (improper search and seizure and denial of counsel), 148 Ct. Cl. 397, 286 F.2d 606, *cert. denied*, 354 U. S. 865 (1960); *Narum v. United States*, (admission of Court of Inquiry testimony, denial of a closed hearing) 151 Ct. Cl. 312, 287 F.2d 897 (1960) *cert. denied*, 368 U. S. 848 (1961); *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982 (1964) *cert. denied*, 377 U. S. 977 (1964). In each case, after full scrutiny of the record, the Court determined—on the merits of the constitutional complaint—that no constitutional deprivation had occurred during the court-martial.

[64] Where the Government contends that the six-year statute of limitations of the Court of Claims blocks retrial and is hence inappropriate for what it misnames an "appellate" procedure, one need only contrast the limitless availability of *habeas corpus* for prisoners whose

(Con't.)

Claims, the entire class of military defendants punished but not jailed would be deprived of all remedies for unconstitutional abuse suffered during military proceedings.[65] On the other hand, if *Augenblick* is reversed, the services would be licensed to try defendants in plain disregard of constitutional rights – so long as pains are taken to dismiss rather than jail whoever may be convicted. That this loophole would be license for prosecutors who desire convictions is all too clear.

Great as would be the injustices worked on individual defendants, the adverse impact on military jurisprudence, whose growth and probity the Congress and this Court have labored to foster, would be significant. Within this jurisprudence, reviewability by civil courts of administrative discharges, sanctioned by this Court in *Harmon v. Brucker*, 355 U.S. 579 (1958), is a key remedy for aggrieved servicemen, while *habeas corpus* is undeniably available for review of constitutional error suffered by those who have been convicted and placed in prison. In an orderly remedial structure with meaningful constitutional guarantees, there is no compelling reason for applying finality to permit collateral review in two cases (where a defendant is imprisoned and where he is discharged without trial), and to bar collateral review where a man is discharged after an unfair trial. To deny collateral review

---

(Cont'd.)

release would surely be at least equally incompatible with discipline as those few victorious elements in the Court of Claims. Moreover, the fact that, in twenty years, only three claims have met success in the Court of Claims (one of which was *Shaw*, where the petitioner had died before he won recovery) surely does not lend gravity to the Government's contention.

[65] In this context, the role of the Court of Claims complements the role of the District Courts, *Glidden Co. v. Zdanok*, 370 U.S. at 565, e.g. in actions for mandatory injunction or declaratory relief, *Gallagher v. Quinn*, 363 F.2d 301, 303-4 (C.A.D.C., 1966), *cert. denied*, 385 U.S. 381 (1966), and *Ashe v. McNamara*, 355 F.2d 277 (C.A. 1, 1965), though the jurisdiction of the Court of Claims rests on independent statutory grounds.

to Commander Augenblick, while according it to Privates Harmon and Burns, would indeed be to make a game of justice.

Moreover, ours is a citizens' army. Unlike armies of the past, ours has no separate mystique, no private set of mores that are above the state. While the discipline of our army must be maintained and the guilty punished, the clamor of those who would isolate the army from civilian concepts of justice has always gone unheeded. Both the hue and cry that military discipline suffers from civilian review and Congress' insistence, to the contrary, on fuller protection of the rights of the military defendant, have taken place immediately wherever vast numbers of our citizens – accustomed to civilian justice – have found themselves in service.

Once more, this country now has large numbers of young men and women in service. It is not the time to curtail statutory rights and constitutional remedies preserved to them by the civilian courts and by American military law, unless Congress directed with unmistakable clarity that this be done. Manifestly, Congress has not done this.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court affirm the judgment in *Augenblick v. United States.*

JOSEPH H. SHARLITT
STEVEN R. RIVKIN
Counsel for the Respondent,
Richard G. Augenblick

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Brief for the Respondent, Richard G. Augenblick, have been served in hand this 26th day of August 1968 upon the Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. and Edgar H. Twine, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., attorney of record for the United States in the Court of Claims herein.

/s/ STEVEN R. RIVKIN

STATUTORY APPENDIX

A. Jencks Act, Act of September 2, 1957, 71 Stat. 595, 18 U.S.C. Section 3500:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter

of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

B. Act of June 25, 1948, c. 646, 62 Stat. 940, as amended July 28, 1953, c. 253, Section 7, 67 Stat. 226; September 3, 1954, c. 1263, Section 44(a), (b), 68 Stat. 1241, 28 USC Sec 1491:

Claims against United States Generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

C. Article of War 50h, Act of June 24, 1948 (Elston Act) c. 625, Sec. 226, 62 Stat. 635:

FINALITY OF COURT MARTIAL JUDGMENTS –

> The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 and 49, the proceedings, finding, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in Article 53.

D. Article of War 53, Act of June 24, 1948, c. 625, Section 230, 62 Stat. 639:

> Action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article . . . and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies and officers of the United States.